TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, PETITIONER,

vs.

BENJAMIN F. JONES ET AL. AND SOSMAN AND LANDIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1899.
CERTIORARI AND RETURN FILED MARCH 16, 1899.

(17,296.)

(17,296.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, PETITIONER,

vs.

BENJAMIN F. JONES ET AL. AND SOSMAN AND LANDIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of Ohio	1	1
Caption	1	1
Bill of complaint	1	1
Exhibit A—Contract to furnish steel, December 13, 1894	10	8
B—Statement of account, March 21, 1896	10	9
Subpœna to hotel company	12	11
Subpœna to Wm. J. McClain	13	11
Appearance of certain defendants	15	13
Marshal's return	15	13
Marshal's return	16	14
Appearance of hotel company	17	14
Demurrer of hotel company	17	15
Order filing answer and cross-bill of Sosman & Landis	18	16
Answer and cross-bill of Sosman & Landis	19	16

	Original.	Print.
Exhibit A—Contract between Wm. J. McClain and Sosman & Landis, February 28, 1895	25	21
B—Statement of account, June 5, 1896	26	22
Opinion on demurrer	31	26
Demurrer to answer and cross-bill of Sosman & Landis	38	31
Decree	39	32
Petition for appeal by Jones *et al*	40	33
Assignment of errors by Jones *et al*	41	34
Petition for appeal of Sosman & Landis	41	34
Assignment of errors by Sosman & Landis	42	35
Order allowing appeal of Sosman & Landis	43	35
Order allowing appeal of Jones *et al*	43	36
Bond on appeal of Jones *et al*	44	36
Bond on appeal of Sosman & Landis	45	37
Clerk's certificate	46	38
Citation on appeal of Jones *et al*	47	39
Citation on appeal of Sosman & Landis	48	40
Appearance for Jones *et al*	50	41
Appearance for Sosman *et al*	50	41
Telegram from counsel to clerk	51	42
Hearing and submission	52	43
Decree on appeal of Jones *et al*	52	43
Decree on appeal of Sosman *et al*	53	43
Opinion	54	44
Clerk's certificate	79	66
Writ of certiorari	80	67
Return to writ of certiorari	81	67
Stipulation as to return	81	68

a

Nos. 535 and 536.

United States Circuit Court of Appeals, Sixth Circuit.

BENJAMIN F. JONES ET AL., Appellants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellee.

SOSMAN & LANDIS, Appellants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellee.

Appeals from the circuit court of the United States for the eastern division of the southern district of Ohio.

Original transcript filed July 13, 1897.
Filed Aug. 3, 1897.

FRANK O. LOVELAND, *Clerk.*

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* ss:

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of June, being also the first *Tuesday* day of that month, in the year of our Lord one thousand eight hundred and ninety-seven and of the American Independence the one hundred and twenty-first.

Present: The Honorable George R. Sage, district judge.

Among the proceedings had were the following, to wit:

JONES AND LAUGHLINS, LIMITED, Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF Hotel Company and Others, Defendants.
No. 796. Bill of Complaint.

Be it remembered that heretofore, to wit, on the 9th day of January in the year of our Lord one thousand eight hundred and ninety-seven, came the complainants by their solicitors and filed in the clerk's office of the court aforesaid their certain bill of complaint herein clothed in the words and figures following, to wit:

Bill of Complaint.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, eastern division, sitting in equity:

2 BENJAMIN F. JONES, GEORGE M. LAUGHLINS, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., Doing Business under the Firm Name and Style of Jones & Laughlins, Limited, Having Their Principal Office and Place of Transacting Business in the City of Pittsburgh and State of Pennsylvania, Bring This Their Bill of Complaint, Complainants,

vs.

THE GREAT WESTERN FIRE PROOF HOTEL COMPANY, a Corporation; William J. McClain, The Grand Rapids School Furniture Company, a Corporation; Daniel W. McGrath, Taylor, Beall a- Company, a Partnership; The Akron Hydraulic Press Brick Company, a Corporation; The Fish Stone Company, a Corporation; The Fish Press Brick Company, a Corporation; Sturgeon, Ford & Company, a Partnership; The Decorative Art Company, a Corporation; Meacham & Wright, a Partnership; Sosman & Landis, a Partnership; Dundon & Bergin, a Partnership; The N. S. Tyler Wire Makers Company, a Corporation; James L. Clarke, The McHose & Lyon Company, a Corporation; William Caldwell, Charles A. Klie, The American Blower Company, a Corporation; Russell & Company, a Corporation; H. C. Johnson & Company, a Partnership; F. O. Schoedinger, Schoedinger, Fearn & Company, a Partnership; Thomas Paige, William White, L. Hiltgartner & Sons, a Partnership; F. Bert Milligan, Assignee of William J. McClain; Henry Caren, Receiver of the Firm of Dundon & Bergin; B. L. Chase, The United States Mortgage & Trust Company, a Corporation; E. F. Schaffer, Doing Business under the Name and Style of Shaffer Roofing Company. } No. 796.

And thereupon your orators complain and say:

3 First. That your orators are members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association organized under an act of the General Assembly of Pennsylvania, approved June 23, 1874, entitled "An act authorizing the formation of a partnership association in

which the capital subscribed shall alone be responsible for the debts of the association except under certain circumstances." Your orators are all of the members and shareholders of said limited partnership association, and have their office and principal place of transacting their business in the city of Pittsburgh and State of Pennsylvania; and said limited partnership association is, and at all times hereafter mentioned was, a citizen of the State of Pennsylvania.

The defendant, The Great Southern Fire Proof Hotel Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, William J. McClain, is a resident of the city of Columbus and State of Ohio, and is a citizen thereof.

The defendant, The Grand Rapids School Furniture Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, and is a citizen thereof.

The defendant, Daniel W. McGrath, is a resident of the city of Columbus and State of Ohio, and is a citizen thereof.

The defendant, Taylor, Beal & Company, is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being William D. Taylor, James P. Beall and William J. Keever.

The defendant, The Akron Hydraulic Press Brick Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and is a citizen thereof.

The defendant, The Fish Stone Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, The Fish Press Brick Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, Sturgeon, Ford & Company, is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being unknown to your orators.

4 The defendant, The Decorative Art Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is a citizen thereof.

The defendant, Meacham & Wright, is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being Floras D. Meacham and Frank S. Wright.

The defendant, Sosman & Landis, is a partnership of Chicago, Illinois, doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators.

The defendant, Dundon & Bergin, is a partnership doing business in the city of Columbus, State of Ohio, the individual partners thereof being Thomas J. Dundon and Matthew J. Bergin.

The defendant, The S. N. Taylor Wire Makers Company, is a corporation organized and existing under and by virtue of the — State of Ohio, and is a citizen thereof.

The defendant, James L. Clarke, is a resident of the city of Columbus and State of Ohio, and a citizen thereof.

The defendant, The McHose & Lyon Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, William Caldwell, is a resident of the State of Ohio, and is a citizen thereof.

The defendant, Charles A. Klie, is a resident of the city of Columbus and State of Ohio, and is a citizen thereof.

The defendant, The American Blower Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, Russell & Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, H. C. Johnson & Company, is a partnership doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators.

The defendant, F. O. Schoedinger, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, Schoedinger, Fearn & Company, is a partnership doing business in the State of Ohio, the individual partners thereof being F. O. Schoedinger, W. A. Fearn and J. R. Dickson.

The defendant, Thomas Paige, is a resident of the city of Cleveland and State of Ohio, and is a citizen thereof.

The defendant, L. Hiltgartner & Sons, is a partnership doing business in the city of Columbus, State of Ohio, the names
5 of the individual partners thereof being unknown to your orators.

The defendant, William White, is a resident of the State of Ohio, and is a citizen thereof.

The defendant, F. Bert Milligan, assignee of William J. McClain, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, Henry Caren, receiver of the firm of Dundon and Bergin, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, B. L. Chase, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, The United States Mortgage & Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen thereof.

The defendant, E. F. Shaffer, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof, doing business in the said city of Columbus, under the firm name and style of the Shaffer Roofing Company.

Second. Your orators further say that on the 13th day of December, 1894, they made and entered into a certain written contract with the defendant William J. McClain, a copy of which contract is hereto attached and marked Exhibit "A;" that said defendant William J. McClain for some time prior to and at said time was engaged as principal contractor for the defendant The Great Southern Fire Proof Hotel Company, in erecting and constructing for the said The

Great Southern Fire Proof Hotel Company, a six-story fireproof hotel and opera-house or theatre on the premises hereinafter described, under and by virtue of the certain written contract with said Great Southern Fire Proof Hotel Company, in which said contract the said McClain agreed and contracted as such principal contractor to construct and complete said fireproof hotel and opera-house, for said company, for the sum of $345,000. That by the terms of the said written contract made and entered into by your orators and the said defendant William J. McClain the terms of which contract are herein set out in Exhibit "A," it was provided that your said orators should furnish the said defendant William J. McClain with nine hundred tons of structural steel for the Great Southern Fire Proof Hotel Company, for the said hotel in the city of Columbus and State of Ohio, said structural steel to be fitted and ready for erection; said structural steel to be so furnished for the sum of $32,500, delivered f. o. b. cars Columbus.

Your orators further say that it was further provided in
6 said contract in an additional quantity of structural steel should be required by the defendant William J. McClain more than the nine hundred tons provided for in said written contract, your orators were to furnish the said William J. McClain with the said additional structural steel at the rate of $1.81 per one hundred pounds; that if an amount of structural steel less than the said nine hundred tons should be required by the said defendant William J. McClain for the purpose stated in said written contract, then your said orators were to allow the said William J. McClain a reduction from the said contract price for said structural steel at the rate of $1.81 per one hundred pounds, for the difference between the structural steel actually shipped and the said nine hundred tons provided for in said contract.

Your orators further say that it was still further provided in said contract that your said orators were to commence the shipping of said structural steel at once, and that the order for the same should be completed by your orators before the first day of August, 1895.

Your orators still further say that it was still further provided for in said written contract, that the payments to your said orators by the said William J. McClain for the structural steel provided for in said written contract were to be cash payments, the same to be made on the fifth day of the month following the shipment of said steel.

Third. Your orators further say that in pursuance of the terms and conditions of said written contract and in strict compliance therewith, your orators between the 16th day of April, 1895, and the 29th day of January, 1896, shipped to and furnished the said defendant William J. McClain with structural steel to the value of $43,296.74 as per an itemized account hereto attached and marked Exhibit "B," which said structural steel so furnished was all used in and about the construction of said Great Southern fireproof hotel and opera-house in the city of Columbus and State of Ohio. And your orators say that they have fully kept and performed all the terms and conditions of said written contract on their part to be kept and performed.

Fourth. Your orators further say that they have received from the defendant William J. McClain, on said written contract the sum of $31,886.72, leaving a balance still due your orators from said William J. McClain for materials furnished him, and labor performed for him under and according to the terms of said written contract, the sum of $11,410.02, with interest thereon from the 28th day of January, 1896.

7 Fifth. Your orators further say that on the 11th day of August, 1896, the defendant William J. McClain made and filed in the probate court of Franklin county, Ohio, a deed of assignment for the benefit of his creditors to F. Bert Milligan, assignee; that said William J. McClain is wholly insolvent and unable to pay the claims of his said creditors including the said claim of your said orators.

Sixth. That on the 21st day of April, 1896, at 4.50 o'clock p. m., within four months after having furnished said material and having performed said labor under and according to the terms of said written contract, your orators duly filed with the recorder of Franklin county, Ohio, an affidavit containing an itemized statement of the amount and value of said materials furnished and labor performed, according to the terms of said written contract between your orators and the said William J. McClain, with all credits thereon, together with a copy of said written contract with the said William J. McClain under which said written contract the said material was so furnished and the said labor was so performed; and also, a description of the premises upon which the said The Great Southern fireproof hotel and opera-house was situate, which said affidavit was thereafter recorded in Book No. 9, pages 99, 100 and 101, of the records of liens of said Franklin county, Ohio, and that upon said 2d day of April, 1896, there was due your said orators upon said account from the said William J. McClain the sum of $11,140.02 with interest thereon from the 28th day of January, 1896.

Seventh. Your orators further say that the said affidavit was so filed with the said recorder of Franklin county, Ohio, in compliance with the terms and provisions of section 3184 as amended April 13, 1894, and 3185 of the Revised Statutes of the State of Ohio.

Eighth. Your orators further say that the premises upon which said fireproof hotel and opera-house building is located are in the county of Franklin, State of Ohio, and in the city of Columbus, and bounded and described as follows:

In lots Nos. 352, 353 and 354, said premises being 187½ feet square, bounded on the north by Main street, on the east by Pearl street, on the south by Noble street, and on the west by High street, in the city of Columbus and State of Ohio.

Ninth. Your orators further say that the material so furnished and the labor so performed in accordance with the terms and conditions of said written contract between your orators and the

8 said William J. McClain constituted a part of the improvement provided for in the contract between the said William J. McClain, the principal contractor, and the said defendant, The

Great Southern Fire Proof Hotel Company, for the erection of said building, and that the same was and is a part of said building.

Tenth. Your orators further allege that by reason of the premises their said claim became a valid and subsisting lien of the said The Great Southern fireproof hotel and opera-house, and the tract of land on which the same is situated and heretofore described, from the 17th day of April, 1895, the date when said labor was commenced, and said materials furnished, for the sum of $11,140.02, with interest thereon from the 28th day of January, 1896, the amount now remaining due and unpaid upon your orators' said claim from the said defendant, William J. McClain.

Eleventh. Your orators further say that the said opera-house or theater in said building was completed on or about the 15th day of September, 1896, since which time the defendant, The Great Southern Fire Proof Hotel Company, has been and is now receiving as annual rental therefor, the sum of $6,500, payable in monthly installments of $541.66⅔ each; that all of the store-rooms in said building are now completed, and all have been leased to various parties and are now occupied by the said parties at annual rentals, the amount of which is unknown to your orators; that said hotel building is now completed, and that the said defendant, The Great Southern Fire Proof Hotel Company, is negotiating with and about to lease the same to parties, the names of which are unknown to your orators, and the annual rent to be paid for the same by said parties is also unknown to your orators.

Twelfth. Your orators further say that the property heretofore described is probably insufficient to pay the encumbrances thereon, and the appointment of a receiver for the collection of all of the said rents therefrom is necessary for the protection and preservation of the rights of your orators herein, and all other lienholders thereof.

Thirteenth. Your orators further say that the defendants, William J. McClain, The Grand Rapids School Furniture Co., Daniel W. McGrath, Taylor, Beall & Company, The Akron Hydraulic Press Company, The Fish Stone Company, The Fish Press Brick Company, Sturgeon, Ford & Company, The Decorative Art Company, Meacham & Wright, Sosman & Landis, Dundon & Bergin, The N. S. Taylor Wire Makers' Company, James L. Clarke, The Mc-
9 Hose & Lyon Company, William Caldwell, Charles A. Klie The American Blower Company, Russell & Company, H. C. Johnson & Company, F. O. Schoedinger, Schoedinger, Fearn & Company, Thomas Paige, William White, L. Hiltgartner & Sons, F. Bert Milligan, assigned of William J. McClain; Henry Caren, receiver of the firm of Dundon & Bergin; B. L. Chase, The United States Mortgage & Trust Company, E. F. Shaffer, doing business as The Shaffer Roofing Company, and each claim to have some interest in the said property of the defendant, The Great Southern Fire Proof Hotel Company, as lienholders or otherwise, the exact nature and extent of which interest your orators are not now advised, and cannot therefore more definitely state.

And therefore your orators pray that the said defendants may be required to answer herein and to fully set forth their respective

claims in the premises and in any default thereof they may be forever barred from asserting any claim whatsoever against said property or any part thereof.

Wherefore your orators respectively pray that a receiver may be appointed herein by your honors to collect all of said rents from the completed portions of said building, so rented as aforesaid, and also all rents which may hereafter accrue by reason of any new leases granted by the said hotel company, and that said receiver be ordered to hold said moneys so collected, subject to the order of your honors herein; that the said claim of your orators against the said William J. McClain be declared by your honors to be a valid and subsisting lien on the premises of the said defendant, The Great Southern Fire Proof Hotel Company, by virtue of said proceedings; that all of the liens on said property be marshaled and that said premises be sold, and that your said orators' claim be satisfied from the proceeds of said sale, and that your orators may have such other and further relief as the nature of the case may require and to your honors seem meet.

May it please your honors to grant your orators a writ of subpœna, directed to the said defendants, commanding each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, and then and there to answer all and singular the matters aforesaid, but not under oath, their answer under oath being waived, and to stand, abide by and perform all such other and further orders and decrees herein as to your honors shall seem meet, and your orators will ever pray, etc.

JONES & LAUGHLINS, LIMITED.
OUTHWAITHE & LINN, *Its Solicitors.*

10 EXHIBIT "A."

"COLUMBUS, O., *Dec.* 13, 1894.

W. J. McClain, Columbus, Ohio.

DEAR SIR: We agree to furnish you with nine hundred (900) tons structural steel for the Great Southern hotel, Columbus, Ohio, fitted ready for erection, in accordance with the revised plans and specifications, for the sum of thirty-two thousand five hundred and eighty ($32,580.00) dollars, delivered f. o. b. cars, Columbus.

We also further agree that if an additional quantity of steel is required more than the 900 tons above specified, that we will furnish the same at the rate of $1.81 per hundred pounds, delivered at Columbus, or, if a less amount is required than the 900 tons, then we will allow a reduction from the contract price at the rate of $1.81 per hundred pounds for the difference between the amount shipped and the 900 tons above specified.

It is understood that we can commence shipment at once, and that all the order will be completed before August 1st, 1895.

Terms of payment are cash to be paid on the fifth of month following shipment.

Yours truly,

(Signed) JONES & LAUGHLINS, LIMITED.
R. GERRY.

The above proposition is this day accepted.

(Signed) W. F. McCLAIN."

EXHIBIT "B."

PITTSBURGH, PA., *March* 21, 1896.

Mr. W. J. McClain, Columbus, Ohio, bought of Jones & Laughlins, Limited.

1895.	
April 17th, mdse	$545 10
April 22nd, mdse	501 21
May 1st, mdse	882 55
May 4th, mdse	432 12
May 11th, mdse	606 30
May 20th, mdse	737 82
May 25th, mdse	670 46
11 May 29th, mdse	546 71
June 1st, mdse	621 00
June 5th, mdse	418 98
June 11th, mdse	491 91
June 17th, mdse	629 61
June 18th, mdse	681 66
June 20th, mdse	11 37
June 21st, mdse	496 49
July 3rd, mdse	766 83
July 13th, mdse	513 25
July 17th, mdse	618 24
July 20th, mdse	632 12
July 29th, mdse	520 56
August 2nd, mdse	664 85
August 5th, mdse	719 60
August 8th, mdse	566 58
August 12th, mdse	453 04
August 16th, mdse	507 19
August 20th, mdse	830 85
August 26th, mdse	823 71
August 28th, mdse	1,270 48
August 31st, mdse	581 92
September 9th, mdse	2,368 40
September 10th, mdse	681 08
September 14th, mdse	934 66
September 20th, mdse	461 75
September 26th, mdse	606 56
September 28th, mdse	636 72

October 1st, mdse	$15 42	
October 3rd, mdse	892 14	
October 7th, mdse	1,616 69	
October 9th, mdse	1,142 99	
October 12th, mdse	932 39	
October 15th, mdse	1,126 28	
October 16th, mdse	489 14	
October 17th, mdse	694 92	
October 19th, mdse	922 39	
October 23rd, mdse	753 21	
October 23rd, mdse	1,060 18	
October 24th, mdse	698 12	
October 24th, mdse	1 60	
October 25th, mdse	701 66	
October 28th, mdse	892 92	
October 29th, mdse	612 70	
October 31st, mdse	759 76	
November 4th, mdse	650 05	
November 6th, mdse	847 17	
November 7th, mdse	584 07	
12 November 11th, mdse	519 72	
November 21st, mdse	668 81	
November 25th, mdse	790 36	
November 26th, mdse	495 29	
December 3rd, mdse	575 72	
December 11th, mdse	16 56	
December 31st, mdse	1,054 31	
1896.		
January 10th, mdse	350 07	
January 28th, mdse	42	
		$43,296 74

1895. CREDIT.		
May 9th, by cash	$1,046 31	
June 10th, by cash	3,875 96	
July 26th, by cash	3,351 02	
August 29th, by cash	3,051 00	
October 5th, by cash	10,000 00	
October 31st, by mdse	24 50	
November 21st, by mdse	84	
November 27th, by mdse	1 17	
November 27th, by mdse	8 76	
December 23rd, by cash	10,000 00	
1896.		
March 20th, by mdse. allowance	527 16	
		31,866 72
Balance		$11,410 02

And afterwards, to wit, on the 9th day of January, A. D. 1897, there was issued out of the clerk's office of the court aforesaid our certain subpœna, directed to the marshal of the district and against

the defendants herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna in Chancery.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

13 You are hereby commanded to summon the Great Southern Fire Proof Hotel Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio (impleaded with others), citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the eastern division of the southern district of Ohio, aforesaid, at Columbus, on the first Monday in March next, to answer a certain bill in chancery, filed and exhibited in said court, against it by Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, and having their office and principal place of business in the city of Pittsburgh, Pa., citizen of and resident in the State of Pennsylvania.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January, A. D. 1897, and in the 121st year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

Memorandum.

The said defendant is required to enter its appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1897, otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*.
C. P. WHITE, *Deputy*.

Endorsed on back: Fifty dollars deposited security for costs for which the plaintiff may be liable in this suit.

And afterwards, to wit, on the 9th day of January, A. D. 1897, there was issued out of the clerk's office of the court aforesaid our certain subpœna, directed to the marshal of the district and against the defendants herein; said subpœna is clothed in the words and figures following, to wit:

14 *Subpœna in Chancery.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon William J. McClain (impleaded with others), citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the eastern division of the southern district of Ohio, aforesaid, at Columbus, on the first Monday in March next, to answer a certain bill in chancery, filed and exhibited in said court, against him by Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, and having their office and principal place of business in the city of Pittsburgh, Pa., citizen of and resident in the State of Pennsylvania.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January, A. D. 1897, and in the 121st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

Memorandum.

The said defendant is required to enter his appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1897, otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*.
C. P. WHITE, *Deputy*.

Endorsed on back: Fifty dollars deposited security for costs for which the plaintiff may be liable in this suit.

And afterwards, to wit, on the 9th day of January, A. D. 1897, the following appearance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

15 *Appearance of Defendants.*

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JONES & LAUGHLINS, LIMITED, Plaintiffs,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Defendants.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, eastern division, sitting in equity:

We, the undersigned, defendants in the above-entitled action, hereby waive the issuing and service of process, and do voluntarily enter our appearance in said action.

AKRON HYDRAULIC PRESS BRICK CO.,
By RICKETTS, BLACK & STOUFFER, *Its Attorneys.*
SOSMAN & LANDIS,
By NASH & LENTZ, *Their Attorneys.*
THE DECORATIVE ART COMPANY,
By NASH & LENTZ, *Its Attorneys.*
DANIEL W. McGRATH AND
TAYLOR, BEALL & COMPANY,
By BOOTH, KEATING & PETERS, *Their Attorneys.*
F. B. MILLIGAN, *Assignee of Wm. J. McClain.*

And afterwards, to wit, on the 18th day of January, A. D. 1896, came the marshal of the district, to whom the above subpœna was in form directed, and returned the same into the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ on the 13th day of January, A. D. 1897, and on the 13th day of January, A. D. 1897, I served the same by handing a true copy thereof with all the endorsements thereon to said Nicholas Schlee, president, Jerry P. Bliss, sec'y, each personally.

16 And on the 14th day of January, A. D. 1897, I left a like copy thereof with all the endorsements thereon at the usual place of residence of said Allen W. Thurman, vice-president.

MICHAEL DEVANNEY,
U. S. M., S. D. O.,
By JAMES FARLEY, *Deputy.*

Fees.

3 copies	1 50
Actual expense	20
3 service	6 00
1 return	30
Total	8 00

And afterwards, to wit, on the 18th day of January, A. D. 1896, came the marshal of the district, to whom the above subpœna was in form directed, and returned the same into the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ on the 13th day of January, A. D. 1897, and on the 14th day of January, A. D. 1897, I served the same by leaving a copy thereof with all the endorsements thereon at the usual place of residence of William J. McClain.

MICHAEL DEVANNEY,
U. S. M., S. D. O.,
By JAMES FARLEY, *Deputy.*

Fees.

1 copy	50
Actual expense	20
1 service	2 00
1 return	30
	3 10

And afterwards, to wit, on the 1st day of February, A. D. 1897, the following appearance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

17 *Appearance of Great Southern Fire P. Hotel Co.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, HENRY A. Laughlin, Jr., Benjamin F. Jones, Jr., Doing Business under Firm Name and Style of Jones & Laughlin, Limited,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, and William J. McClain *et al.* } No. 796.

To the clerk of said court:

Please enter our appearance as solicitor- and of counsel on behalf of the Great Southern Fire Proof Hotel Company.

J. J. STODDARD,
J. E. SATER,
G. J. MARRIOTT,
Solicitors for Defendant.

And afterwards, to wit, on the 24th day of February, A. D. 1897, the following demurrer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, *et al.*, Defendants. } No. 796.

The demurrer of The Great Southern Fire Proof Hotel Company, defendant, to the bill of complaint of the plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's
18 bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said plaintiff has not, in and by said bill, made or stated such a cause as doth or ought to entitle *them* to any such discovery or relief as therein sought and prayed for from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant demurs thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN J. STODDART,
J. E. SATER,
G. J. MARRIOTT,
Solicitors for Defendant Hotel Co.

STATE OF OHIO, } *ss:*
Franklin County, }

Nicholas Schlee makes solemn oath and says, that he is the president of the above-named corporation, The Great Southern Fire Proof Hotel Company, and that the foregoing demurrer is not interposed for delay.

N. SCHLEE, *Pr.*

Sworn to before me and subscribed in my presence, this 23rd day of February, 1897.

[SEAL.]

P. J. MAGLEY,
Notary Public in and for Franklin County, Ohio.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN J. STODDARD,
Of Counsel for Defendant.

And afterwards, to wit, on the 6th day of March, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 204.

Leave to File Answer.

This day came Sosman & Landis, defendants herein, by their attorneys, Nash & Lentz, and leave of court first being obtained, filed their answer and cross-bill herein.

19 And afterwards, to wit, on the 6th day of March, A. D. 1897, the following answer and cross-bill was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Answer and Cross-bill.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HENRY A. Laughlins, Jr., Benjamin F. Jones, Jr., Doing Business under the Firm Name and Style of Jones & Laughlin, Limited, Having Their Principal Office and Place of Transacting Business in the City of Pittsburgh and State of Pennsylvania, Bring This Their Bill of Complaint

against

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation; William J. McClain, The Grand Rapids School Furniture Company, a Corporation; Daniel W. McGrath, Taylor, Beall & Company, a Partnership; The Akron Hydraulic Press Brick Company, a Corporation; The Fish Stone Company, a Corporation; The Fish Press Brick Company, a Corporation; Sturgeon, Ford & Company, a Partnership; The Decorative Art Company, a Corporation; Meacham & Wright, a Partnership; Sosman & Landis, a Partnership; Dundon & Bergin, a Partnership; The N. S. Tyler Wire Makers' Company, a Corporation; James L. Clarke; The McHose & Lyon Company, a Corporation; William Caldwell, Charles A. Klie; The American Blower Company, a Corporation; Russell & Company, a Corporation; H. C. Johnson & Company, a Partnership; F. O. Schoedinger, Schoedinger, Fearn & Company, a Partnership; Thomas Paige, William White, L. Hilgartner & Sons, a Partnership; F. Bert Milligan, Assignee of William J. McClain; Henry Caren, Receiver of the Firm of Dundon & Bergin; B. L. Chase, The United States Mortgage & Trust Company, a Corporation; E. E. Shaffer, Doing Business under the Name and Style of Shaffer Roofing Company. } No. 796.

Answer of defendants, Joseph S. Sosman and Perry Landis, partners, doing business as Sosman & Landis.

20 Joseph S. Sosman and Perry Landis, partners, doing business under the firm name and style of Sosman & Landis,

having their principal office and place of transacting business in the city of Chicago, and State of Illinois, and defendants in the above-entitled suit, for answer to the bill of complaint therein, or so much thereof as they are advised is material and necessary for them to make answer to, answering, say:

First. We have been informed and believe, and we have no reason to doubt, that the statements in paragraph numbered first in plaintiff's bill of complaint are true.

Second. We believe and admit that the allegations in the second paragraph of said bill of complaint, that said defendant Wm. J. McClain, for some time prior to the 13th December, 1894, and at said date, was engaged as principal contractor for the defendant, The Great Southern Fire Proof Hotel Company, in erecting and constructing for the said The Great Southern Fire Proof Hotel Company, a six-story fireproof hotel and opera-house, or theater, on the premises described in said bill of complaint, under and by virtue of a certain written contract with said Great Southern Fire Proof Hotel Company, in which said contract the said McClain agreed and contracted, as principal contractor, to construct and complete said fireproof hotel and opera-house for said company for the sum of three hundred and forty-five thousand dollars ($345,000), is true. We do not know, and are unable, as to our belief or otherwise, to set forth whether or not the other statements, or any one of the other statements contained in the paragraphs numbered second to fourth, both inclusive, of the plaintiffs' bill of complaint, are or is, true, or which of them are or is true, or in what respect is untrue or otherwise, and we therefore leave the plaintiffs to make such proof thereof as they shall be able to produce.

Third. We admit the allegations contained in the fifth paragraph of the bill of complaint in respect to the assignment and the insolvency of William J. McClain, and his inability to pay the claims of his said creditors, including our claim.

Fourth. We do not know and cannot set forth, as to our belief, or otherwise, whether or not the statements, or any one of them, contained in paragraphs numbered sixth and seventh, both inclusive, of plaintiffs' bill of complaint are or is true or which of them are or is true or untrue.

Fifth. We admit the statements and allegations contained
21 in paragraph numbered eighth of said bill of complaint, in respect to the description of the premises upon which said fireproof hotel and opera-house building is located.

Sixth. We do not know and cannot set forth, as to our belief, or otherwise, whether or not the statements and allegations, or any of them, contained in paragraphs numbered ninth and tenth, both inclusive, of said bill of complaint, are or is true, or which of them, or whether any of them is untrue.

Seventh. We believe and admit that the statements and allegations contained in the paragraphs numbered respectively eleventh and twelfth, both inclusive, of the said bill of complaint, are true, and we particularly admit and aver that the Great Southern Fire Proof Hotel Company has been and is now receiving an annual

rental for the opera-house and theater in said building in the sum of six thousand five hundred dollars ($6,500) in monthly installments of five hundred and forty-one sixty-six and two-thirds hundredths dollars ($541.66⅔) each, and that all the store-rooms in said building are now completed, and have been leased to various parties, and are now occupied by the said parties, at an annual rental, the amount of which is unknown to these defendants, and we especially admit and aver that the property described in said bill of complaint is probably insufficient to pay the incumbrances thereon, and that the appointment of a receiver for the collection of all the said rents therefrom is necessary for the protection and preservation of the rights of these defendants, and all other lienholders thereon.

Eighth. We admit that we claim a lien on the property of the defendant, The Great Southern Fire Proof Hotel Company, as set forth in paragraph thirteenth of the bill of complaint, and we believe that the other persons, companies and corporations set forth in said paragraph thirteenth of the bill of complaint also claim a lien upon the property of the defendant, The Great Southern Fire Proof Hotel Company, as set forth in paragraph thirteenth of said bill of complaint.

Ninth. These defendants further say that on the 28th day of February, 1895, they made and entered into a certain written contract with the defendant, William J. McClain, a copy of which contract is hereto attached and marked "Exhibit A;" that said defendant, William J. McClain, for some time prior to and at the time said contract was entered into, was engaged as principal contractor for the defendant, The Great Southern Fire Proof Hotel Com-
22 pany, in erecting and constructing for the said The Great Southern Fire Proof Hotel Company, a six-story fireproof hotel and opera-house or theater, on the premises hereinafter described, under and by virtue of a certain written contract, made between the said defendant, William J. McClain, and The Great Southern Fire Proof Hotel Company, on or about the 10th day of October, 1894, a copy of which contract is now in the possession of said The Great Southern Fire Proof Hotel Company, to which reference is here made, in which said contract the said McClain agreed and contracted as such principal contractor, to construct and complete said fireproof hotel and opera-house for said company for the sum of three hundred and forty-five thousand dollars ($345,000); that by the terms of said written contract made and entered into between us and the said defendant, William J. McClain, the terms of which contract are herein set forth in "Exhibit A," it was provided that these defendants should furnish and supply to the said defendant William J. McClain, certain described scenery, stage-work, fixtures and properties as set forth in detail in the specifications, which *is* attached and made a part of the contract and marked "Exhibit A." Said scenery, stage-work, fixtures and property were to be supplied and furnished for the sum of seven thousand one hundred dollars ($7,100.00), to be paid as follows: $2,366.66 when the greater part of the scenery named in the specifications was delivered on the stage of said opera-house in Columbus, Ohio;

the further sum of $2,366.66 when all the work named in specifications was well under way toward completion, and the remaining sum of $2,366.68 when the entire contract was completed in accordance with said specifications. It was still further provided by the terms of said contract that the entire work to be performed by these defendants under said contract and all material and supplies should be furnished and ready for use on or before the 1st day of September, 1895, but should there be any delay in the stage being ready for the scenery, by reason of change of plans or unexpected delays, then these defendants were to have a reasonable time after September 1st to complete the same.

Tenth. These defendants further say that in pursuance of the terms and conditions of said written contract, and in strict compliance therewith, they did, between the 28th day of February, 1895, and the 26th day of March, 1896, ship to and furnish the said defendant, William J. McClain, scenery, stage-work, fixtures and properties, as set forth in the itemized statement hereto attached and marked "Exhibit B," which said scenery, stage-work, fix-
23 tures and properties so furnished was all used in and about said opera-house erected by the defendant, said William J. McClain, for the defendant, The Great Southern Fire Proof Hotel Company, in the city of Columbus and State of Ohio; and these defendants say that they have fully kept and performed all the terms and conditions of said written contract on their part to be kept and performed.

Eleventh. These defendants further say that they received from the defendant, William J. McClain, on said written contract, the sum of $2,000, and the defendant, The Great Southern Fire Proof Hotel Co., the sum of $600, leaving a balance still due these defendants from said Wm. J. McClain for said materials furnished to him, and labor performed for him under and according to the terms of said written contract with the full knowledge and consent of the defendants, The Great Southern Fire Proof Hotel Company, of the sum of $4,500, with interest thereon from the 26th day of March, 1896.

Twelfth. That on the 20th day of June, 1896, at 3.55 o'clock p. m., within four months after having furnished said material and having performed said labor, under and according to the terms of said written contract, these defendants duly filed with the recorder of Franklin county, Ohio, an affidavit containing an itemized statement of the amount and value of said materials furnished and labor performed, according to the terms of said written contract between these defendants and the said William J. McClain, with all credits thereon, together with a copy of said written contract with the said William J. McClain, under which said written contract the said material was so furnished and the said labor was so performed, and also a description of the premises upon which the said The Great Southern fireproof hotel and opera-house was situate, which said affidavit was thereafter recorded in Book No. 9, pages 193, 194, 195, 196, and 197, of the records of liens of said Franklin county, Ohio, and upon said 20th day of June, 1896, there was due these defendants upon said account from the said William J. McClain the sum

of $4,500, with interest thereon from the 26th day of March, 1896.

Thirteenth. These defendants further say that the said affidavit was so filed with the said recorder of Franklin county, Ohio, in compliance with the terms and provisions of section 3184, as amended April 13th, 1894, and 3185 of the Revised Statutes of the State of Ohio.

Fourteenth. These defendants further say that the premises
24 upon which said fireproof hotel and opera-house building is located are in the county of Franklin and State of Ohio, and in the city of Columbus, and bounded and described as follows:

"Being in lots Nos. three hundred and fifty-two (352), three hundred and fifty-three (353) and three hundred and fifty-four (354), in the city of Columbus, Ohio, as the same are numbered and delineated on the plat of said city, of record in the recorder's office, Franklin county, Ohio, and located and situated on the southeast corner of Main and High streets of said city."

Fifteenth. These defendants further say that the material so furnished and the labor so performed in accordance with the terms and conditions of said written contract between these defendants and the said William J. McClain, constituted a part of the improvement provided for in the contract between the said William J. McClain, the principal contractor, and the said defendant, The Great Southern Fire Proof Hotel Company, for the erection of said building, and the said — was and is a part of said building.

Sixteenth. These defendants further aver that by reason of the premises their said claim became a valid and subsisting lien on the said The Great Southern fireproof hotel and opera-house building, and the tract of land on which the same is situated, as hereinbefore described, from the date when said labor was first commenced and said material furnished, for the sum of forty-five hundred dollars ($4,500), with interest thereof from the 26th day of March, 1896, the amount now remaining due and upaid upon the claim of these defendants against the defendant, William J. McClain.

Seventeenth. These defendants further say that they are informed and believe that the said opera-house or theater, in said building, was completed on or about the 15th day of September, 1896, since which time the defendant, The Great Southern Fire Proof Hotel Company, has been, and now is, receiving an annual rental therefor in the sum of sixty-five hundred dollars ($6,500.00); that all the store-rooms in said building are now completed, and all have been leased to various parties, and are now occupied by said parties at an annual rental, the amount of which is unknown to these defendants. These defendants are informed and believe that said hotel building is now completed, and that the said defendant, The Great Southern Fire Proof Hotel Company, is negotiating with and about to lease the same to parties, the names of which are unknown to these defendants, at a rental which is unknown to these defendants.

25 Eighteenth. These defendants further say that they are informed and believe that the property heretofore described is insufficient to pay the incumbrances thereon, and the appoint-

ment of a receiver for the collection of all the said rents therefrom is necessary for the protection and preservation of the rights of these defendants, and all other lienholders thereon.

Wherefore, these defendants pray that a receiver may be appointed herein by this honorable court, to collect all said rents from said building so rented as aforesaid, and all rents which may hereafter accrue by reason of any new leases granted by the said hotel company, and that said receiver be ordered to hold said money so collected subject to the order of this court herein; that the said claim of these defendants against the said William J. McClain be declared by your honors to be a valid and subsisting lien on the said premises of the said defendant, The Great Southern Fire Proof Hotel Company, by virtue of said proceedings; that all the liens on said property be marshaled, and that said premises be sold, and that the claim of these defendants be satisfied from the proceeds of said sale, and that these defendants may have such other and further relief as the nature of the case may require, and as to your honors may seem just and equitable.

NASH & LENTZ,
Solicitors for Joseph S. Sosman and Perry Landis.

"EXHIBIT A."

Contract.

Contract for scenery and stage fittings for an opera-house now being erected by the Great Southern Hotel and Opera House Company, situated between Main and High streets, in the city of Columbus, Franklin county, Ohio.

This contract entered into this 28th day of February, A. D. 1895, by and between William J. McClain, of Columbus, Franklin county, Ohio, party of the first part, and Sosman and Landis, of Chicago, Cook county, Illinois, party of the second part, witnesseth:

That the parties of the second part agree to supply to the party of the first part certain described scenery, stage-work, fixtures and properties, as set forth in detail in a certain specification, which is marked Exhibit A, attached to and is hereby made a part of this contract. In consideration of the faithful performance of
26 this contract, according to the specification set forth, the party of the first part agrees to pay the parties of the second part for said work and material supplied the sum of seven thousand one hundred dollars ($7,100.00), to be paid as follows: Two thousand three hundred and sixty-six dollars and sixty-six cents ($2,366.66) when the greater part of the scenery named in the specifications is delivered on the stage of said opera-house in Columbus, Ohio. The further sum of two thousand three hundred and sixty-six dollars and sixty-six cents, when all the work named in specifications is well under way toward completion, and the remaining sum of two thousand three hundred and sixty-six dollars and sixty-eight cents, when the entire contract is completed in accordance with the specifications hereto attached.

The parties of the second part hereby agree that the entire work shall be completed and ready for use on or before the 1st day of September, A. D. 1895, but should there be any delay in the stage being ready for the scenery, by reason of change of plans, unexpected delays, etc., etc., the party of the first part is to give the parties of the second part due notice of the same, to govern them in the shipment of the scenery and stage fittings. The party of the first part agrees to allow the parties of the second part full possession of the stage for a term of at least thirty days before the opening of the theater, as such length of time is an absolute necessity to the parties of the second part in order that they may have sufficient time in which to perform their work of getting in readiness the stage and scenery for the opening date.

Witness our hands and seals this day and date as first above written.

(Signed) W. J. McCLAIN.
(Signed) SOSMAN & LANDIS.

"EXHIBIT B."

CHICAGO, *June* 5, 1896.

W. J. McClain, general contractor, Columbus, Ohio, bought of Sosman & Landis.

Feb.	2, 1896.	1 act drop curtain.
	"	1 asbestos fireproof curtain.
	"	1 valance border.
27	"	1 grand drapery border.
	"	1 trip drapery border.
Jan.	27, 1896.	2 tormentor wings.
	"	1 light fancy chamber set, consisting of:
	"	1 center door piece.
	"	2 set doors.
	"	2 jog pieces.
	"	6 wings.
	"	1 center arch.
	"	2 side arches.
	"	3 borders.
	"	All framed.
	"	1 dark fancy chamber set, consisting of:
	"	1 center door piece.
	"	2 set doors.
	"	2 jog pieces.
	"	6 wings.
	"	1 center arch.
	"	2 side arches.
	"	3 borders.
	"	All framed.
	"	1 Gothic chamber set, consisting of:
	"	1 center door piece.
	"	2 set doors.

Jan. 27, 1896. 2 jog pieces.
" 6 wings.
" 2 arches.
" All framed.
" 1 oak chamber set, consisting of:
" 1 center door piece.
" 2 set doors.
" 2 jog pieces.
" 6 wings.
" 2 arches.
" All framed.
" 1 plain chamber set, consisting of:
" 1 center door piece.
" 2 set doors.
" 2 jog pieces.
" 6 wings.
" All framed.
" 1 kitchen set, consisting of:
" 1 center door piece.
" 2 set doors.
" 6 wings.
" 1 hooded fireplace.
" 3 kitchen borders.
" All framed.
28 " 1 prison set, consisting of:
" 1 center door piece.
" 2 set doors.
" 6 wings.
" 2 jog pieces or columns.
" All framed.
" 1 attic set in back of prison, consisting of:
" 1 center door piece.
" 2 set doors.
" 6 wings.
" All framed.
" 1 palace backing drop 26 x 42 ft.
" 3 palace leg drops 26 x 42 ft.
" All battened.
" 1 dark wood drop 26 x 42 ft.
" 1 light wood drop 26 x 42 ft.
" 1 garden drop 26 x 42 ft.
" 1 cut wood drop 26 x 42 ft.
" 1 conservatory drop 26 x 42 ft.

W. H. McClain, general contractor, Dr. to Sosman & Landis—Continued.

About Jan. 27th, '96. 1 garden drop 26 x 42 ft.
" 1 ancient street drop 26 x 42 ft.
" 1 modern street drop 26 x 42 ft.
" 1 rocky pass drop 26 x 42 ft.

About Jan.	27th, '96.	10 wood wings profiled 7 x 20 ft.
	"	10 wood wings flippers 3 x 20 ft.
	"	6 street wings profiled 7 x 20 ft.
	"	6 street wing flippers 3 x 20 ft.
	"	2 rocky pass wings 7 x 20 ft.
	"	2 rocky pass wing flippers 3 x 20 ft.
	"	6 horizon wings 6 x 20 feet.
	"	All framed.
	"	5 foliage borders 12–15–15 x 45 ft.
	"	All battened.
	"	3 arched sky borders 12 x 42 ft.
	"	All battened.
	"	5 straight sky borders 7–6 x 42 ft.
	"	All battened.
	"	1 conservatory backing.
	"	2 fancy interior backings.
	"	1 plain interior backing.
	"	1 ceiling piece.
	"	All framed.
29	"	1 set house framed.
	"	1 balcony framed.
	"	1 return framed.
	"	1 cottage with return and porch framed.
	"	1 log cabin framed.
	"	1 hedge row three pieces framed.
	"	1 picket fence.
	"	1 large boat.
	"	1 small boat.
	"	2 trees framed and profiled.
	"	1 bridge framed and profiled.
	"	2 bridge rocks framed and profiled.
	"	4 tail rocks framed and profiled.
	"	1 center rock, framed and profiled.
	"	2 water rows framed.
	"	1 ground row framed.
	"	1 bar backing framed.
	"	1 bar counter framed.
	"	1 garden wall.
	"	1 gate framed.
	"	1 garden balustrade in four pieces, framed
	"	1 return framed.
	"	1 fancy mantel.
	"	1 plain mantel.
	"	1 well curb and hood, framed.
	"	1 house balcony and return framed.
	"	1 bay window framed.
	"	2 flower vases framed.
	"	4 dozen grass mats.
	"	2 set banks.
March	15th, '96.	6 Roman stools.
	"	2 throne chairs.

March 15th, '96.	2 throne steps.	
"	1 fire-log and fender.	
"	4 garden chairs.	
"	2 garden settees.	
"	2 garden tables.	
"	2 garden stumps.	
"	1 fancy medallion carpet.	
"	1 green baize carpet.	
"	6 carpet rugs.	
"	4 fur rugs.	
30 "	3 pairs tapestry curtains and poles.	
"	4 table covers.	
"	4 pedestals.	
"	4 pieces papier-mache statuary.	
"	12 music stands.	
Dec. 20th, '95.	4 dozen extension stage braces.	
"	4,800 ft. border battens attached.	
"	1,200 ft. cable wire.	
"	33,000 ft. ½-in. Manilla rope.	
"	400 ft. ¾-in. Manilla rope.	
"	130 ft. ⅜-in. cable wire.	
"	32 patent clips.	
"	380 6-in. loft pulleys and pins.	
"	190 wooden pulley blocks.	
"	96 wooden lead blocks.	
"	29 12-in. pulleys and pins.	
"	29 pulley blocks for same.	
"	24 8-in. pulleys.	
"	24 blocks for same.	
"	8 pairs 12-in. strap hinges.	
"	1 working paint frame with all attachments.	
Jan. 1st, 1896.	Stage machinists' work and putting in traps, grooves.	
March 21st, 1896.	Paint frame, adjusting and putting in place all of the above-described scenery and materials, labor bills, freight, fares, etc., connected therewith..	$6,500 00
Oct. 17th, '95.	Credit by cash on account of note..	2,000 00
	Balance..	$4,500 00

I hereby certify that the above bill is correct, to the best of my knowledge and belief.

PERRY LANDIS.

Subscribed and sworn to before me, this 5th day of June, 1896.

W. F. DUNHAM,
Notary Public.

31 And afterwards, to wit, on the 6th day of April, A. D. 1897, the following opinion was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Opinion of Judge George R. Sage, District Judge, Southern Dist. of Ohio.

United States Circuit Court, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, *et al.*, Respondents. } No. 796.

On demurrer.

The complainants sue to foreclose a mechanics' lien asserted by them as subcontractors upon the hotel building of the respondent, The Great Southern Fire Proof Hotel Company, for certain materials furnished towards the erection of said building between the 16th of April, 1895, and the 29th of January, 1896, under and by virtue of a written contract by and between them and William J. McClain, principal contractor for said company, in the erection of its building. The lien is asserted under and by virtue of section 3184 Ohio Statutes, as amended, and section 3185 of the Rev. Stats., as supplemented April 13, 1894. 91 O. L., 135, section 3184, provides that "a person who performs labor, or furnishes machinery or material for constructing, altering or repairing" any structure mentioned in the section, including a house, mill, manufactory or other building "by virtue of a contract with or at the instance of the owner thereof, or his agent, trustee, contractor or subcontractor," shall have a lien to secure the payment of the same upon such "house, mill, manufactory or other building, and upon the interest, leasehold or otherwise, of the owner in the lot or land, on which the same may stand, or to which it may be removed."

The supplement to section 3185, designated as 3185*a*, provides that "in all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such owner, or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens, for which the property may be held, shall not, in the absence of
32 fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, materialmen, or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors and materialmen and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

Section 3185 provides that "such person, in order to obtain such lien, shall, within four months from the time of performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material," and other items and particulars not necessary to be here quoted, "and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or towards the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

The respondents demur to the bill *of* insufficiency. The demurrer was argued solely upon the question of the constitutionality of the act of April 13, 1894, there being no objection to the bill on other grounds. The supreme court of Ohio, in Young *v.* The Lion Hardware Company, 32 Weekly Law Bulletin, 315, held that the act of April 13, 1894, "in so far as it gives a lien on the property of the owner to subcontractors, laborers and those who furnish machinery, material or title to the contractor is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner." Much time in the argument was given to the dis-

33 cussion of the proposition that this court should follow that decision without examining into the merits of the question, and that proposition is elaborately presented in the brief for the respondents. The material was furnished and delivered by complainants and used in the construction of the hotel of respondents before the decision of Young *vs.* The Lion Hardware Company was announced. In Burgess *v.* Seligman, 107 U. S., 32, the Supreme Court of the United States said: "When contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation — may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Action on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseeming conflict with well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies

between citizens of different States, was to constitute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." In Carroll County *v.* Smith, 111 U. S., 556, the Supreme Court said "that the decision of the highest court of a State, construing the constitution of the State, is not binding upon this court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this court, and when the rights which it affects here were acquired before it was made." To the same effect is Anderson *v.* Santa Anna, 116 U. S., 356. In Louisville Trust Company *v.* The City of Cincinnati, 76 Federal Rep., 296, the circuit court of appeals of this circuit held that "where a contract or obligation has been entered upon before there has been any judicial construction of the State statute upon which the contract or obligation depends, by the highest court of the State, a Federal court, obtaining jurisdiction of the question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State court, exercise
34 an independent judgment as to the validity and meaning of such contracts, and will not necessarily follow opinions of the State court construing such statute, if such decisions be rendered after the rights involved in the controversy originated."

Counsel for respondents attempt to distinguish these cases, and especially The Louisville Trust Company *vs.* The City of Cincinnati, from the case now under consideration, but I am not able to see that there is any material difference. It is true that in Louisville Trust Company *vs.* The City of Cincinnati the question was whether the statute was applicable, and not whether it was valid. The gist of the Federal cases cited is that under the circumstances stated, the Federal courts will not apply the original rule that the decision of the highest court of a State, construing or passing upon the validity of a State statute, is binding. It will be necessary, therefore, to look into the question of the constitutionality of the statutory provisions involved, independently of the decisions made by the supreme court of Ohio.

Section 3184, as amended, purports to give to a subcontractor a lien on the house, mill, manufactory or building to secure the payment of his claim for labor, machinery or material. By section 3185*a*, this lien is not to exceed the actual value of such labor machinery or material, and the aggregate amount of liens is not, in the absence of fraud or collusion between the owner and original contractor, to exceed the amount of the price agreed upon between them for the performing of such labor and the furnishing of such material or machinery. These provisions are made irrespective of the state of the account between the owner of the building and the principal contractor. The owner may have paid in advance, according to the terms of his contract, and, if so, he must, according to the statute, pay in addition the amount of the subcontractor's lien. If his contract with the principal contractor provide for payment, not in money, but by the transfer of property, as land, he must, never-

theless, pay in money to the subcontractor, in order to discharge his lien, the full amount thereof. It is my opinion that the supreme court of Ohio rightly held that this provision is an interference with the vested right of the owner to contract for his building upon the best terms possible, and that "if he can, by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in
35 its enjoyment; and it is not within the power of the General Assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relation." This view is supported by the statement of the law in Overton on Liens, section 553, and by the following authorities: The supreme court of Pennsylvania in Waters *v.* Wolf, 162 Pa. St., 153, held that a statutory provision which made the written consent of the subcontractor necessary in order to bind him by a stipulation in the contract between the original contractor and the owner that no mechanics' liens should be filed, was unconstitutional in that it attempted to create a debt and give a lien therefor against the express covenant in the contract; also that a provision that the contractor should be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials should be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation should be consented to by the subcontractor, was unconstitutional because it attempted to frame a new contract and substitute it for the one made by the parties. The court said that the indefeasible right to acquire and possess property and the right of freedom of contract in the acquisition and protection of property necessarily included the right to make reasonable contracts for the improvement of property; and that a contract that no mechanics' lien should be filed was not unreasonable as to either contractor or subcontractor. In Stewart *v.* Wright, 52 Iowa, 335, the court said: "If one should contract with a builder to erect a house and agree to pay him in advance and comply with his contract by making the payments, we very much question whether it is within the power of the legislature to require that he shall be liable to pay for his building twice by paying off claims of subcontractors who may assert liens after the payments have been made." To the same effect, see Lumber Co. *vs.* Sault Savings Bank, 77 Mich., 199, where the court said: "That a mechanics' lien law enacted for the sole purpose of enabling strangers to the title to land to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever, is unconstitutional, leaves the law as it was before its passage." That decision was quoted and followed in Mellis *v.* Race, 78 Mich., 80; Snell *v.* Race, 78 Mich., 334. The supreme court of Minnesota, in Meyer *v.* Burlandi, 37 Minn., 438, declared that as liens
36 are incumbrances upon the owner's property "it is fundamental that they can only be created by his consent or

authority. No man can be deprived of his property without his consent, except by due process of law. The basis of the right to enforce a claim as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained." It is true that in Mallory *v.* Le Crosse Abattoir Co., 18 Wis., 182, a statute similar to the Ohio statute, under consideration, was, by a divided court, held constitutional, but I am forced to the conclusion that the dissenting opinion in that case is the better statement of the law. See also Henry *v.* Rice, 18 Mo. App., 512; Renton *v.* Conley, 49 Cal., 187, where it was held that a statute similar to the Ohio statute was invalid because it sought to hold the property for more than the contract price. There are decisions to the contrary, as cited in brief for complainants, but they only serve to emphasize the statement of the court in Burgess *v.* Seligman; Anderson *v.* Santa Anna, and Louisville Trust Company *v.* The City of Cincinnati, *supra*, that it is the duty of the Federal court to lean to an agreement with the State court, especially in cases of doubt. The reasoning of the cases which declare statutes of the same character as the Ohio statutes invalid is, in my judgment, to be preferred to that of the courts which uphold such laws.

Counsel for the complainants cite Winder *v.* Caldwell, 14 How., 434, and Purinton *v.* The Hull of a New Ship, 2 Curtis, 416, as Federal decisions where a statute similar to the one complained of in this case was enforced. These cases were decided on other points. In neither of them was the constitutionality of the act questioned by counsel or considered by the court. Cases are also cited for complainants which sustain the proposition that statutory liens may be created in favor of the contractors. This proposition generally stated is undeniable. So long as such a statute does not interfere with the right of the owner to make contracts, there can be no question as to its validity. A lien law which only provides a statutory subrogation and protects the same by a lien, only enacts and secures an equity, and to such an enactment the owner of the property covered by the lien can make no valid objection. But, in the case now under consideration, the objection is, that the owner's right to make his own contracts is interfered with, and the objection is well taken.

Reference is made by counsel for complainants to decisions by the supreme court of Ohio prior to that announced in Young *v.*
37 The Lion Hardware Company, in cases which they claim involved the same principle of constitutional construction, and which are in conflict with that opinion. They urge that under those decisions and under the law as understood and adjudicated then and until the complainants' material herein were furnished, the act complained of must necessarily have been held constitutional. Their proposition is, that under such circumstances the rule is clear, not only that the United States court, in a case within its jurisdiction, will act independently, but that if it finds that decisions do so conflict, it will follow the early decisions as to all rights accruing under them before the last decision. In support of this proposition

they cite Douglass *v.* Pike County, 101 U. S., 677. But in that case the prior decisions were made under the same act. Here the decision in Young *v.* The Lion Hardware Company is the first and only decision by the supreme court under the act. In Douglass *v.* Pike County, the supreme court said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

But here, the case arises under an amendment of the law, and not under a change of decision. Moreover, the amendment is a departure from all previous legislation by the State of Ohio upon the subject. Counsel admit that there was no adjudication in Ohio of the exact point decided in Young *v.* The Lion Hardware Co. prior to that case, but they insist that the principles involved had been settled in many cases, which were in effect, if not in words, overruled by that decision. Without stopping to cite and comment upon the cases referred to in support of this contention, it is sufficient to say that their view, if adopted, would extend the rule laid down in Douglass *v.* Pike County, beyond all precedent. The demurrer will be sustained, and the bill and the cross-bill of the respondents, Sosman and Landis, to which also a demurrer for insufficiency was filed, upon the same ground as those urged in support of the demurrer to the bill, will be dismissed.

GEO. R. SAGE,
U. S. District Judge, S. D. O.

April 5, 1897.

And afterwards, to wit, on the 12th day of April, A. D. 1897,
38 the following demurrer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Demurrer to Answer of Sosman & Landis.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, *et al.*, Defendants. } No. 796.

The demurrer of The Great Southern Fire Proof Hotel Company, defendant, to the cross-bill of complaint of the defendants Sosman & Landis.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said defendants' cross-bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said defendant has not in and by said cross-bill

made or stated such a cause as doth or ought to entitle them to any such discovery or relief as therein sought and prayed for, from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said cross-bill, this defendant demurs thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN J. STODDART,
JOHN E. SATER,
G. J. MARRIOTT,
Solicitors for Defendant Hotel Co.

STATE OF OHIO, *Franklin County,* } ss:

Nicholas Schlee makes solemn oath and says that he is the president of the above-named corporation, The Great Southern Fire Proof Hotel Company, and that the foregoing demurrer is not interposed for delay.

N. SCHLEE, *Pr.*

39 Sworn to before me and subscribed in my presence, this 10th day of February, 1897.

P. J. MAGLEY,
[SEAL.] *Notary Public in and for Franklin County, Ohio.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN J. MARRIOTT,
Of Counsel for Defendant.

And afterwards, to wit, on the 3rd day of May, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 224.

This day came the parties and thereupon this cause came on to be heard on the demurrer of the defendants, The Great Southern Fire Proof Hotel Company, filed to the bill of complaint, and also upon the demurrer of the said The Great Southern Fire Proof Hotel Company to the cross-bill of complaint of the defendants, Sosman and Landis, and was argued by counsel and submitted to the court.

On consideration whereof, and being fully advised in the premises, the court doth find that said demurrers, and each thereof, are well taken and doth allow and sustain said demurrers and each thereof.

It is therefore ordered and decreed that said demurrers, and each thereof, be, and they hereby are, allowed and sustained.

And thereupon, the said complainant not desiring to amend its said bill of complaint, and the said defendants, Sossman & Landis, not desiring to amend their said cross-bill, it is ordered adjudged and decreed that said bill of complaint and said cross-bill be, and the same are each hereby, dismissed as to the defendant, The Great Southern Fire Proof Hotel Company, with costs to the defendant, The Great Southern Fire Proof Hotel Company, to be taxed.

To all of which rulings, judgments, orders and decrees the said complainants and the said defendants, Sossman and Landis, except and ask that their exceptions in that behalf be noted by the court and hereby, in open court, give notice of and pray an appeal from each and all of said rulings, judgments, orders and decrees.

40 The appeal is granted and the amount of the bond therefor is fixed at $250.00.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following petition of appeal was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition on Appeal of Jones & Laughlins.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants, *vs.* THE GREAT SOUTHERN FIRE PROOF HOTEL Company, Defendant.	In Equity. Petition on Appeal.

Now comes Jones & Laughlins, Limited, complainants herein, and conceiving themselves to be aggrieved by the decree made and entered on or about the 3rd day of May, 1897, in the above-entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

OUTHWAITHE & LINN,
Attorneys for Complainants.

Dated this — day of ——, 1897.

The foregoing claim of appeal is allowed.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

41 *Assignment of Errors of Jones & Laughlins.*

In the Circuit Court of the United States, Southern District of Ohio Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL CO., Defendants.

Assignment of errors.

And now comes the said complainants in this action and say that the decree in said cause is erroneous and against the just rights of said complainants for the following reasons:

First. The court erred in sustaining the demurrer of the defendant, The Great Southern Fire Proof Hotel Company, to the bill of complaint.

Second. The court erred in rendering judgment in favor of the defendant, The Great Southern Fire Proof Hotel Company, and against these complainants.

Third. Judgment should have been rendered in favor of these complainants and against said defendant.

Fourth. The court erred in holding the sections of the mechanics' lien law of Ohio, under which complainants seek to enforce the lien set out in their bill, to be unconstitutional.

OUTHWAITHE & LINN,
Attorneys for Complainants.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following petition on appeal was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition on Appeal of Sossman & Landis.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL Co. *et al.*, Defendants.
In Equity. Petition on Appeal.

42 Now come Sossman and Landis, defendants herein, and conceiving themselves to be aggrieved by the decree made and entered on or about the 3rd day of May, 1897, in the above-entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons specified in the assignment of errors, which is filed herein, and they pray that this appeal may be allowed, and that the transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

NASH & LENTZ,
Attorneys for Sossman & Landis.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Assignment of Errors of Sossman & Landis.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants, *vs.* THE GREAT SOUTHERN FIRE PROOF HOTEL Co. *et al.*, Defendants.	796. Assignment of Errors.

Now comes Sosman and Landis, defendants in this action, and say that the decree in said cause is erroneous and against the just rights of the said defendants, Sosman and Landis, for the following reasons:

First. The court erred in sustaining the demurrer of the defendant, The Great Southern Fire Proof Hotel Company, to the cross-bill of complaint filed by these defendants, Sosman and Landis.

Second. The court erred in rendering judgment in favor of the defendant, The Great Southern Fire Proof Hotel Company, and against these defendants, Sosman and Landis.

Third. Judgment should have been rendered in favor of these defendants, Sosman and Landis, and against said defendants, The Great Southern Fire Proof Hotel Company.

Fourth. The court erred in holding the sections of the
43 mechanics' lien law of Ohio, under which these defendants sought to enforce the lien set out in their cross-bill to be unconstitutional.

NASH & LENTZ,
For Sosman & Landis.

May 27, 1897.
Dated this 27th day of May, 1897.
The foregoing claim of appeal is allowed.

And afterwards, to wit, on the 5th day of June, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 241.

Appeal Allowed; Bond Fixed.

This day came Sosman & Landis, defendants herein, by their attorneys, Messrs. Nash & Lentz, and presented their petition for allowance of appeal to the United States circuit court of appeals for the sixth circuit, accompanied by an assignment of errors, which said petition, after due consideration by the court, is granted and appeal allowed, and bond fixed at two hundred and fifty dollars.

And afterwards, to wit, on the 10th day of June, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 253.

Appeal Allowed; Bond Fixed.

This — day of ——, 1897, came the complainants, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of an appeal intended to be urged by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States court of appeals for the sixth judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the appeal upon the complainants' giving bond according to law in the sum of two hundred and fifty dollars ($250.00).

44 And afterwards, to wit, on the 10th day of June, A. D. 1897, the following bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, as principal, and The American Bonding and Trust Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Great Southern Fire Proof Hotel Company in full and just sum of two hundred and fifty dollars, to be paid to the said The Great Southern Fire Proof Hotel Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 8th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately, at the January term, 1897, of the circuit court of the United States, southern district of Ohio, eastern division, the suit pending in said court between Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, and The Great Southern Fire Proof Hotel Company, *et al.*, defendants, a judgment was rendered against said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, and The Great Southern Fire Proof Hotel Company, *et al.*, defendants, a judgment was rendered against said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, plain-

tiffs, and the said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Laughlins, Jr., doing business under the firm name of Jones and Laughlins, Limited, having obtained an appeal and filed a copy thereof in the clerk's office to reverse the judgment in the aforesaid suit, and a citation directed to the said The Great Southern Fire Proof Hotel Company, citing and admonishing it to be and appear at a session of the United States circuit court of appeals for the sixth judicial circuit, to be holden at the city of Cincinnati, in said circuit, on the — day of —— next:

45 Now, the condition of the above obligation is such, that, if the said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, complainants, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

BENJAMIN F. JONES,
GEO. H. LAUGHLINS,
HENRY A. LAUGHLINS, JR., AND
BENJAMIN J. JONES, JR.,
Doing Business under the Firm Name of Jones & Laughlins, Limited,
By OUTHWAITHE & LINN, *Attorneys.*
THE AMERICAN BONDING & TRUST CO. OF MARYLAND,
By W. D. TURNER, *Sp'c'l Ag't.*
A. L. THURMAN, *Attorney-in-fact.*

Sealed and delivered in presence of—
E. BRAGUMIER,
SINGLETON P. OUTHWAITHE.

Approved:
GEO. R. SAGE,
U. S. District Judge, S. D. O.

And afterwards, to wit, on the 28th day of June, A. D. 1897, the following bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Joseph S. Sosman and Perry Landis, partners, doing business as Sosman & Landis, of Chicago, Illinois, as principal, and The American Bonding & Trust Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Great Southern Fire Proof Hotel Company in the full and just sum of two hundred and fifty dollars ($250.00), to be paid to the said The Great Southern Fire Proof Hotel Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, adminis-

trators, successors and assigns, jointly and severally by these presents.

46 Sealed with our seals and dated this 8th day of June, A. D. 1897.

Whereas, lately, at the January term, 1897, of the circuit court of the United States, southern district of Ohio, eastern division, in the suit pending in said court between Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, plaintiffs, and the Great Southern Fire Proof Hotel Company, *et al.*, defendants, a judgment was rendered against said Sosman & Landis, partners, and said Sosman & Landis having obtained an appeal to the United States circuit court of appeals, and filed a copy thereof in the clerk's office to reverse the judgment in the aforesaid suit, and a citation directed to the said The Great Southern Fire Proof Hotel Company, citing and admonishing it to be and appear at a session of the United States circuit court of appeals for the sixth judicial circuit, to be holden at the city of Cincinnati, in said circuit, on the 5th day of October next:

Now, the condition of the above obligation is such, that, if the said Sosman & Landis, a partnership, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

JOS. S. SOSMAN AND PERRY LANDIS,
Partners, Doing Business as Sosman & Landis,
By NASH & LANDIS, *Their Attorneys.*
THE AMERICAN BONDING & TRUST COMPANY OF MARYLAND,
By W. D. TURNER, *Special Agent.*
A. L. THURMAN, *Attorney-in-fact.*

Sealed and delivered in presence of—
E. BRAGANIER.
Z. P. LINN.

Approved:
GEO. R. SAGE,
U. S. Dist. Judge, S. D. O.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } ss:

47 I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause, and as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the

seal of said court, at the city of Columbus, Ohio, this 6th day of July, A. D. 1897.

[SEAL.] B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN, *Dep. Clerk*.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

To the Great Southern Fire Proof Hotel Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 27th day of July next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-eighth day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

GEO. R. SAGE,
Judge of the United States District Court within and for the Southern District of Ohio, Sitting and Holding Circuit Court at the Trial of said Entitled Cause.

---

* Not exceeding 30 days from the day of signing.

48 UNITED STATES OF AMERICA, }
Southern District of Ohio. }

Received this writ at Columbus, Ohio, on the 30th day of June, 1897, and on the 2nd day of July, 1897, I served the within-named The Great Southern Fire Proof Hotel Company, a corporation, by handing a true copy hereof, with all the endorsements thereon, personally to Nicholas Schlee, president of said company, and on the 3rd day of July, 1897, I served a true copy hereof, with all the endorsements thereon, by handing the same personally to Frank Rinehardt, treasurer of said company, The Great Southern Fire Proof Hotel Company, a corporation. And on the 3rd day of July I served a true copy hereof, with all the endorsements thereon, on Gerard P. Bliss, secretary of the within-named company, by leaving

the same in the hands of his wife, an adult member of his family, at his usual place of residence in Columbus, Ohio.

MICHAEL DEVANNEY,
U. S. Marshal, S. D. O.,
By JAMES FARLEY, *Deputy.*

6 copies	$1 50
3 services	6 00
6 miles writ	36
	$7 86

No. 796. Marshal's civil docket No. 375. United States circuit court, southern district of Ohio, eastern division. Great Southern Fire Proof Hotel Co. *vs.* Benjamin F. Jones. Citation. Filed July 12, 1897. B. R. Cowen, clerk.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

United States Circuit Court of Appeals for the Sixth Circuit.

To the Great Southern Fire Proof Hotel Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* seventh day of August next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein
49 Joseph S. Sosman and Perry Landis, partners, doing business as Sosman & Landis, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-second.

GEO. R. SAGE,
U. S. Dist. Judge, S. D. O.

* Not exceeding 30 days from the day of signing.

UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } *ss:*

Received this writ at 9 a. m. on the 9th day of July, 1897, at Columbus, Ohio, and at 9 a. m. on the 10th day of July, 1897, I executed the same by handing a true copy thereof, with all the endorsements thereon, to Nicholas Schlee, president; Frank Rhinehardt,

treas., of said within-named company; and on the same day I served Gerard P. Bliss, sec'y, by leaving a copy thereof in the hands of his wife, an adult member of his family, at his usual place of residence.

MICHAEL DEVANNEY,
U. S. M., S. D. O.,
By JAMES FARLEY, *Deputy.*

Fees.

3 copies	$1 50
Mileage	36
3 services	6 00
	$7 86

No. 796. Marshal's civil docket No. 381. United States circuit court, southern district of Ohio, eastern division. Jones & Laughlin, Limited, *vs.* The Great Southern Fire Proof Hotel Company, *et al.* Citation. Filed July 12, 1897. B. R. Cowen, clerk. Nash & Lentz.

50 And afterwards, to wit, on July 23, 1897, an appearance was entered in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit,
October Term, 1896.

JONES & LAUGHLIN
v.
GREAT SOUTHERN FIRE PROOF HOTEL COMPANY. } No. 535.

To the clerk of said court:

Please enter my appearance as counsel for the appellants.

TALFOURD P. LINN.

And afterwards, to wit, on July 26, 1897, an appearance was entered in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit,
October Term, 1896.

No. 535.

To the clerk of said court:

Please enter my appearance as counsel for the appellants.

GEORGE K. NASH.

51 And afterwards, to wit, on October 25, 1897, a stipulation was filed in said court in said cause continuing the cases to the heel of the calendar, which is in the words and figures following:

Form No. 168.

The Western Union Telegraph Company.

Incorporated.

21,000 offices in America. Cable service to all the world.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

This is an unrepeated message, and is delivered by request of the sender under the conditions named above.

THOS. T. ECKERT,
President and General Manager.

Received at N. W. cor. 4th and Vine Sts., Cincinnati, O., standard time.

16 Fa ar 30 paid ex w

Fa Columbus, O., 23.

Frank O. Loveland, clerk United States circuit court of appeals, Cin., O.:

The two Great Southern Fire Proof Hotel cases may be placed at the foot of the calendar.

GEORGE K. NASH,
J. J. STODDART,
T. P. LINN,
J. E. SATER,
Attorneys for Parties in Interest.

4.04 p. m.

And afterwards, to wit, on December 15, 1897, and entry was made upon the journal of said court in said cause, which is in the words and figures as follows:

52 United States Circuit Court of Appeals for the Sixth Circuit.

BENJ. F. JONES ET AL.
v.
GREAT SOUTHERN FIRE PROOF HOTEL COMPANY.

SOSMAN & LANDIS
v.
SAME.

Appeals from the circuit court of the United States for the southern district of Ohio.

Before Judges Taft, Lurton, and Clark.

These causes came on to be heard this day and were argued by Messrs. T. P. Linn and George K. Nash, for the appellants, and Messrs. J. J. Stoddart and Mr. J. E. Sater, for the appellee, and *was* submitted.

And afterwards, on April 5, 1898, a decree was entered in said cause; which decree reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

BENJ. F. JONES ET AL.
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY. # 535.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court
53 in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to the court whence it came, with directions to overrule the demurrer and require the defendants to answer.

And afterwards, on the same day, to wit, a decree was entered in said cause; which decree reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

SOSMAN & LANDIS
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY. # 536.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to the court whence it came, with directions to overrule the demurrer and require the defendant to answer.

And afterwards, on the 15th day of April, an opinion was rendered in said causes, which is in the words and figures as follows:

Opinion.

54 United States Circuit Court of Appeals, Sixth Circuit.

BENJAMIN F. JONES ET AL., Appellants,
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, Appellee.

SOSMAN & LANDIS, Appellants,
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, Appellee.

} Nos. 535, 536.

Appeals from the circuit court of the United States for the eastern division of the southern district of Ohio.

Submitted December 15, 1897; decided April 5, 1898.

Before Taft and Lurton, circuit judges, and Clark, district judge.

This is a bill to enforce the statutory lien given to persons who do labor or furnish materials for the construction or repair of any house or other building, by section 3184, Revised Statutes of Ohio, as amended by the act of April 13, 1894. By section 3184 it is provided that "a person who performs labor, or furnishes machinery or material for constructing, altering or repairing" any house or other structure mentioned in the section, "by virtue of a contract with or at the instance of the owner thereof, or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same," upon the structure, "and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand." Section 3185 provides that the lien shall be claimed and recorded within four months from the time of furnishing such labor or material, and that the lien shall operate from the date of the first item in the account. Section 3185*a* is as follows:

"In all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, mate-
55 rial or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original con-

tractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, materialmen or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and subcontractors, materialmen and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The complainants are members of a firm doing business at Pittsburg, Pa., and are each citizens of Pennsylvania. The defendants are, The Great Southern Fire Proof Hotel Company, a corporation of the State of Ohio, against whom the lien is asserted, and William J. McClain, a citizen of Ohio and the contractor to whom materials were sold for use in the hotel building constructed by him at Columbus, Ohio, for the Great Southern Fire Proof Hotel Company. The other defendants are corporations, firms, and individuals, claiming liens of various kinds upon the same property. They are all citizens of States other than Pennsylvania.

The bill in substance avers that the defendant, McClain, entered into a contract with the Great Southern Fire Proof Hotel Company to construct and complete at Columbus, Ohio, a six-story fireproof hotel and opera-house for the sum of $345,000; that complainants contracted on the 13th of December, 1894, to furnish to said McClain, for use in said building, some nine hundred tons of structural steel; that under said agreement, they delivered, between April 16, 1895, and January 24, 1896, such steel to the value of $43,296.74, which steel so furnished was all used in the construction of said house. They further aver that a balance of $11,410.02 is due and unpaid, and that within four months after said steel was delivered they filed and recorded their lien as required by section 3185, Revised Statutes of Ohio. There is no averment that the hotel company is indebted to said McClain, or that it was indebted when the lien was filed. Neither is it averred that said hotel company had any notice of any such contract between complainants and McClain, nor promised to pay for same, nor that any contractual relations whatever existed between it and complainants. The hotel company demurred to the bill for want of equity. This demurrer was sustained and the bill dismissed by Judge Sage, whose opinion is reported in 79 Federal Reporter, 477.

56 LURTON, circuit judge, after making the foregoing statement of facts, delivered the opinion of the court:

The decision must turn here upon the constitutionality of the Ohio statute giving the subcontractors, laborers and materialmen a lien upon the building and property of the owner, for labor or materials furnished at the instance of the principal contractor. So much of the statute as gives a lien to complainants as subcontractors has been declared by the supreme court of Ohio to be null and void, as

in conflict with the Ohio bill of rights, which, among other things, declares that the right of "acquiring, enjoying and possessing property" is inalienable. That decision was made in a suit to which complainants were not parties, and after their rights under the law had accrued and their claim of lien recorded as required by the statute.

Young *v.* Lion Hardware Co., 55 Oh. St., 423.

Does that decision furnish a rule of decision which is obligatory upon courts of the United States? When a citizen of one State enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a court of the United States. That right does not by any means involve the application of a different rule of decision, for the judiciary act requires that the laws of the several States shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest courts of the State by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon courts of the United States. The question is, when do they apply? In the past this inquiry has involved no little friction between the courts of the Union and those of the States. But the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made that court has in an authoritative way decided:

1. That such decisions are not necessarily obligatory upon courts of the United States where they affect contracts which were valid under the constitution and laws of the State as interpreted and enforced by its highest judicial tribunals at the time they were entered upon.

Rowan *v.* Runnels, 5 How., 134.
Ohio Life & Trust Co. *v.* Debolt, 16 How., 432.
Gelpcke *v.* The City of Dubuque, 1 Wall., 175.
Olcott *v.* The Supervisors, 16 Wall., 678.
Taylor *v.* Ypsilanti, 105 U. S., 60.
Douglass *v.* County of Pike, 101 U. S., 677.
Louisville Trust Co. *v.* Cincinnati, 47 U. S. A., 36–46.

In Rowan *v.* Runnels, *supra*, Chief Justice Taney said:

"Undoubtedly this court will always feel itself bound to
57 respect the decisions of the State courts, and from the time they were made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made."

In Douglass *v.* County of Pike, cited above, the court, after reviewing the preceding cases, decided by that court, said:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amend-

ment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

2. Neither are such decisions obligatory upon courts of the United States when thereby the validity of contracts between a citizen of the State and a citizen of another State is affected, which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess *v.* Seligman, 107 U. S., 20–33.
Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S., 67–72.
Louisville Trust Co. *v.* Cincinnati, 47 U. S. A., 36–47.

In Louisville Trust Co. *v.* Cincinnati, *supra*, this court, after stating the general rule to be that a court of the United States would adopt and follow the construction of a State statute announced by the highest court of the State, said:

"A well grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the State whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while 'leaning to an agreement with the State court,' exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of State statutes may be an element in the case, and will not be bound to follow opinions of the State court construing such statute if such decisions were rendered after the rights involved in the controversy originated."

In Burgess *v.* Seligman, cited above, the court declined to follow the supreme court of Missouri in respect to the interpretation of a statute of that State, the decision having been made after
58 the transaction in controversy had arisen. Justice Bradley, in that case, speaking for a unanimous court, said:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the State tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the

course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special con-
59 sideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail."

This case does not fall under the first class of exceptions stated above. The Ohio mechanics' lien statutes, prior to the amendment of April 13, 1894, only gave a lien to creditors of the principal contractor for labor or materials furnished at his instance upon such balance as was due from the owner to the contractor when notice was given of the claim to a lien. Such statutes are in the nature of mere garnishee proceedings, whereby the creditors of the contractor are substituted to the lien of the contractor.

Copeland *v.* Menton, 22 Oh. St., 398.
Dunn *v.* Rankin, 27 Oh. St., 398.
Bullock *v.* Horn, 44 Oh. St., 420.
Stark *v.* Simmons, 54 Oh. St., 435.

The last case cited was one in which the owner was permitted to set off his debt to the contractor by a claim he held against him when the contract was made, and thus defeated the effort of laborers to assert a lien against the owner.

The cases of Railway Co. *v.* Cronin, 38 Oh. St., 122, and Railway Co. *v.* McCoy, 42 Oh. St., 251, were suits under a statute giving liens to those contributing labor or materials to the construction of a railway. It does not appear that the principal contractor had been paid and no constitutional objection to the law was urged or decided.

Smith *v.* Parsons, 1 Ohio, 236, and Weil *v.* State, 46 Ohio, 450, presented no question as to any mechanics' or other lien statute, and the opinions are mere applications of the rule that contracts are made upon the basis of the existing law, and that a statute which operated only upon future contracts was, therefore, not legislation impairing the obligation of contracts. While these decisions have a bearing upon the general question of the legislative power to impress a lien upon the property of an owner in favor of those having no direct contractual relation with him, yet they do not constitute judicial decisions directly bearing upon the law with reference to which complainants may be said to have contracted. There has, therefore, been no such change of opinion by the supreme court of Ohio as to bring into operation the rule that the rights of the parties are to be determined according to the law as it had been judicially declared when the contract was made.

This brings us to the question as to whether the Ohio legislature exceeded its constitutional powers in providing that subcontractors and materialmen should have a lien, limited in extent by the original contract price to be paid the contractor, upon the
60 building and land of the owner, to secure them for labor and materials furnished at the instance of the contractor. The facts of this case are such as to entitle the complainants to demand from this court an independent judgment and expression of opinion as to the validity of the Ohio statute under which their transactions were had and under which they claim a lien.

With every disposition to come to an agreement with the views of the supreme court of Ohio, in the interest of harmony of decision, we are nevertheless compelled to express our inability to assent to the conclusions of that learned and impartial tribunal as to the validity of the legislation under which complainants' rights are claimed. The decision of that court was not placed upon any merely local or peculiar provision of the constitution of Ohio. The ground upon which they placed their objection to the law was, that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.

"The owner," said the Ohio court, "has the right to acquire his building upon the best terms possible, and if he can by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in its enjoyment, and it is not

within the power of the General Assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relations. To enable the contractor, by force of this statute, to enlarge the price to be paid by allowing liens to be taken on the property for labor and materials, would be as unjust as to authorize the owner, by statute, to enlarge the building, without a corresponding increase in payment." 55 Oh. St., 423-442.

In answer to the argument that the contract was made with the statute before him, and thereby made the law a part of the contract itself, and consented that those who furnished labor or materials to the contractor for his use would have a lien, the court said:

"This begs the question, and assumes the constitutionality of the statute. If the statute is valid it must be read into the contract, but if invalid it binds neither party, and does not become a part of the contract." This restraint upon an owner's liberty of contract the learned court said was prohibited by those declarations of the Ohio bill of rights, which declare that among the inalienable rights of man is "the right of enjoying and defending his life and liberty, acquiring, possessing and defending property and seeking and obtaining happiness." Touching the fundamental rights thus enumerated and their application to the law under consideration, the court said:

"It is worthy of notice that the Constitution is established to secure the blessings of freedom, and to promote the common
61 welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the General Assembly, under the powers conferred by that instrument, are to be such as shall secure the blessings of freedom and promote our common welfare. To make this more emphatic, the first section of the bill of rights provides that "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." And by the second section it is provided that "all political power is inherent in the people. Government is instituted for their equal protection and benefit." The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the General Assembly. Article 2, section 28. The word "liberty," as used in the first section of the bill of rights does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. People *v.* Marks, 99 N. Y., 377; 52 Am. R., 34; Bertholf *v.* O'Reilly, 74 N. Y., 15; 30 Am. R., 323; Matter of Jacobs, 98 N. Y., 98; 50 Am. R., 636.

"Contracts and compacts have been entered into between men

tribes, and nations during all time, from the earliest dawn of history, and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare, and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people must appear, not only to the General Assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts, and it must be so clear that a court of justice in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. People *v.* Gillison, 109 N. Y., 389; 4 Am. R., 465. The statute in restraint of the liberty to contract as to interest on money is valid for the reason that all can see that it is for the common welfare. Many other like cases of restraint as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this court in State *v.* Lake Erie Iron Co., unreported, to hold the statute unconstitutional which required corporations to pay their employés at least twice in each month. Our exemption laws can be sustained only
62 on the ground, that while they in a slight degree limit the liberty of contract, such limitation is for the general welfare of the whole people, and does not interfere with their equal protection and benefit. In such cases courts can see that the slight restraint of the liberty of contract is for the common welfare of the people, but no court can see that it is for the common public welfare that the liberty of contract should be taken away from the owner of a building to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract."

We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The "rights" supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government and like declarations are to be found in all or most of our State constitutions. The question is, therefore, one of general law, having as much reference to the constitution of any other State as to that of Ohio.

In the case of Whiting *v.* Fond du Lac County, 25 Wis., 188, it was held that under the constitution of Wisconsin a tax could not be constitutionally laid in aid of the building of a railroad. The Supreme Court of the United States refused to follow this as a decision obligatory upon it in a case involving the validity of an act of the Wisconsin legislature authorizing a tax in aid of a railroad.

Upon the question as to whether the decision was one of local or

general law the court, in Olcott *v.* The Supervisors, 16 Wall., 678–690, said:

"This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State can conclusively determine for us. This consideration alone satisfies our minds that Whiting *v.* Fond du Lac County furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

In support of the conclusion reached by the Ohio court
63 there have been cited but two cases; Sprey Lumber Co. *v.* Sault Ste. Marie Savings Bank, 77 Mich., 199, and Waters *v.* Wolf, 162 Pa. St., 153. The Michigan case cited involved the validity of the Michigan act No. 270, Michigan Laws of 1887. The act was held void. The second section of that act provided that the lien given to subcontractors or materialmen should "not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original of any subcontractor, by any payment made by such owner, part owner or lessee to such contractor or subcontractor for the contract price of such labor or material, or any part thereof." The court said such a law "strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer." The case cites no authorities and states no particular provision of the constitution of Michigan which was violated.

The state of the decisions in Pennsylvania is quite peculiar. Under the mechanics' lien act of 1803 and 1806, it was held that the owner of any interest in the land upon which the improvement was placed could by his contract bind the land in its entirety.

Savoy *v.* Jones, 2 Rawle, 343.

In the case cited, Gibson, C. J., thus stated the ground upon which such a result was to be justified:

"The object of the legislature was to enable the mechanic or materialman to follow his labor or material into the building, which is pledged for the price, without regard to the estate of the owner. Did the lien proceed from a contract with the owner, the argument drawn from the apparent injustice of permitting a tenant for life to affect the estate of the remainderman, who was not a party, would not be destitute of plausibility. But there is no real injustice in the matter, the owners of the several parts of the fee being proportionately benefited; and it is consequently just that the whole should bear the burden."

By the later acts of 1836 and 1845 it was provided that a lien should exist in favor of all debts contracted by the owner or contractor for labor or materials. This legislation was upheld upon the theory that the contractor was by implication made the
64 agent of the owner to fasten a lien upon the building and the owner's land for debts contracted for labor and materials.

Harlan *v.* Rand, 27 Pa., 511.
Singerly *v.* Doer, 62 Pa., 9.
Duff *v.* Hoffman, 69 Pa., 191.

Adhering to this idea of an implied agency of the contractor for the owner, it was held in Schroeder *v.* Galland, 134 Pa., 277, that a subcontractor or materialman could have no right against the owner not founded on the contract between the owner and his contractor. That the agency of the owner was special and limited by his contract of which all who give him credit must take notice, and that if he contracted that neither himself nor any other should have a lien, that none could be claimed by subcontractors or others.

In Taylor *v.* Murphey, 148 Pa. St., 337, it was held that a stipulation by the contractor that he "will release and discharge the said houses from the operation of all liens," etc., was not a waiver of the right to enter a lien, or a covenant that none should be entered, but only a personal undertaking on the part of the contractor to settle any liens that might be filed before demanding payment of the balance due upon his contract, and that, therefore, subcontractors had acquired valid liens. To meet the ruling in Schroeder *v.* Galland, and cases following it, the act of 1891, was passed. That act provided that the owner should make no contract with the contractor which should operate to defeat the rights of subcontractors and materialmen to file liens, and that all subcontractors should have a lien notwithstanding any stipulation to the contrary in the contract between the contractor and owner unless consented to in writing by such subcontractors.

In Waters *v.* Wolf, 162 Pa. St., 153, a lien was asserted by a subcontractor who had not consented to a stipulation by which the contractor was to neither have nor create any lien in favor of others. The court, in an elaborate opinion, held the act of 1891 invalid, as an unauthorized restraint upon the right of "acquiring, possessing

and protecting property," and not within the delegated powers of the legislature.

The Ohio act involved here contains no provision expressly prohibiting an agreement limiting the supposed agency of the contractor for the owner, or restraining him from creating any lien, such as was contained in both the Michigan and Pennsylvania statutes. If such acts are properly to be regarded as constituting the contractor a special agent for the owner, to which he consents by making a contract with the law before him, it would seem that the Ohio act would be valid, there being no inhibition of an agreement withholding such power, and no intimation that the hotel company, in this instance, limited the implied agency of the contractor. Certainly the Pennsylvania decisions give no support to the de-
65 cision of the Ohio court that the Ohio act is void. Under the settled line of decisions in Pennsylvania the Ohio act is valid. In the last Pennsylvania case, that of Waters *v.* Wolf, cited above, the court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here, saying:

"In the absence of an express contract against liens, with a statute before him giving a lien to those with whom he contracted, the consent of the owner that a remedy given by law should be enforced under the contract was certainly to be implied."

In all or nearly all of the States there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner.

These statutes vary in their character and purpose. Originally they were chiefly acts giving a lien to persons having direct contractual relations with the owner. Such statutes did not protect those who contributed to the improvement through dealings with the contractor, and were soon followed by statutes extending the lien to persons not contractually connected with the owner, but who furnished labor or materials for the building through contracts with the principal contractor. This was accomplished in two ways:

1. By giving to creditors of the contractor a derivative lien, whereby they were substituted to the rights of the contractor as they existed when notice was given of the claim. Such statutes were in the nature of mere garnishee or attachment proceedings, and were subject to no criticism as doing injustice to the owner. Payment in advance was a defense under all such statutes, for the contractor's creditors could stand in no better situation than he did. So, if he had no lien, his creditors had none, as their utmost right was to be substituted to the contractor's place.

2. Or by statutes which gave to those who furnished such labor or materials to the contractor a direct or independent lien upon the building and land of the owner. Under these, payments to the contractor prior to expiration of the time within which notice might be given were ineffectual, the lien not being a derivative one, but independent of that given the contractor. Some of these statutes sought to diminish the severity of this legislation by limiting the aggregate of such liens to the original contract price; or, by pro-

viding for a contractor's bond for the benefit of the owner with summary remedy thereon, or by both. The verbiage of statutes of the latter class varies. In some the contractor is declared to be the agent of the owner, and as such authorized to obtain labor and materials upon the credit of the owner or his building and land, or both.

In a large number of cases the question of the constitutionality of acts extending the lien to subcontractors and others having no direct contractual relation with the owner has been brought in question and the validity of the legislation upheld. In still other instances, such acts have been enforced without question
66 as to their constitutionality. We cite a number of cases, though by no means all, in which acts involving questions identical with those raised by the Ohio statute have been enforced either after their validity had been challenged or *sub silentio*.

In New York the constitutionality of an act like the Ohio act was twice raised and twice decided favorably to the lien.

Blauvelt *v.* Woodworth, 31 N. Y., 284.

Glacius *v.* Black, 67 N. Y., 563.

In Blauvelt *v.* Woodworth, *supra*, payments made to the contractor in advance of the time within which liens might be filed were held to have been made at the peril of the owner, and a sale of the premises by the owner, after the completion of the building, but before notice and within the time within which notice might be given, were held ineffectual to defeat the lien of the materialmen. Touching the constitutionality of a law which brought about such consequences, the court said:

"There is no provision of the constitution which precludes the legislature from declaring a statutory lien, in respect to future contracts, in favor of either the contractor, the subcontractor or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are performed. The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

And in Glacius *v.* Black, *supra*, the constitutional objection was again urged. The court said:

"The constitutionality of the legislation known as mechanics' lien laws, was affirmed in Blauvelt *v.* Woodworth, and the court held that there was no constitutional objection to the creation, by the legislature, of statutory liens, in favor of mechanics and others, for the purposes and under the circumstances and limitations specified in these statutes. Laws of similar character have been in force in this State for more than forty years (Laws of 1844, chap. 220); and similar legislation is found on the statute books of many of the States. These statutes have been frequently under considera-

tion by the courts, and so far as we know, their constitutional validity has never been judicially questioned."

In Minnesota similar statutory liens have been enforced. O'Neil *v.* St. Olaf's School, 26 Minn., 329; Bohn *v.* McCarthy, 29 Minn., 23; Laird *v.* Noona, 32 Minn., 358. In the case last cited, the constitutionality of the law was elaborately considered by the court. Among other things, the court said:

"As such liens are incumbrances upon the owner's title, they can only be created by his consent or authority; and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the con-
67 tractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract." "The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned, by making a contract while such is the law."

That liens for an amount in excess of the contract price of the improvements or building might be asserted, was held to be no objection. On this subject the court said:

"As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his consent is implied. To avoid the incumbrance of such liens the owner takes the burden of securing the bond which he is authorized by the act to take. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the persons whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred." Spofford *v.* True, 33 Maine, 283; Taggard *v.* Buckmore, 42 Maine, 77. "It is ordinarily understood from the nature of the case, that under building contracts the work is not to be done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged."

In Wisconsin such an act was sustained over an earnest dis-

sent by Judge Cassady. Mallory *v.* La Crosse Abattoir Co., 80 Wis., 170.

In Missouri the case of Henry *v.* Rice, 18 Mo. App. Rep., 497, was overruled and the validity of the act sustained in an able opinion by Judge Barclay. Henry *v.* Evans, 97 Mo., 47.

In Massachusetts an act which did not expressly extend the lien to subcontractors or workmen was held to give a lien upon an implied agency of the contractor. In Parker *v.* Bell, 7 Gray, 420, the court construed an act which provided that "any person who shall actually perform labor in erecting, altering or repairing any
68 building or structure upon real estate, or shall furnish materials actually used for the same, by virtue of any agreement with or consent of the owner thereof, or other person having authority or acting for such owner to procure labor or furnish materials in his behalf, shall have a lien upon such building or structure, and upon the interest of the owner of the building or structure in the lot of land upon which the same is situated, to secure the payment of the amount due him for such labor and materials;" and gave to a plasterer employed by a subcontractor an independent lien, the court saying:

"That the employment of a principal contractor to build a dwelling-house for a definite and fixed compensation operated to authorize the latter to do all acts necessary and proper to enable him to fulfill his contract and to complete the tenement to be erected. It was, of course, understood between the parties that this work was not to be wholly and in every part done by the contractors with their own hands. They were fully empowered to employ, in the execution of the contract, the necessary workmen, and to cause their labor to be faithfully applied in fulfilment of its provisions. The consent of the respondents to such employment of laborers, and such application of their labor, is a necessary and inevitable implication from the contract under which the house was to be erected. The labor, therefore, which was actually performed by the petitioners, in doing the plaster and stucco work of the house, and which was a necessary part of the construction, having been rendered by virtue of an agreement with Whittemore & Currier, must be considered to have been performed with the consent of the respondents. It was done for their benefit, and under stipulations into which they had entered, by force of which they were entitled to insist that the contract should be fully performed."

In Donahy *v.* Clapp, 12 Cush. (Mass.) Reports, 440, Shaw, Ch. J., for the court, said, concerning the theory upon which the subcontractor might acquire a lien upon the land of the owner: "Such liens in favor of subcontractors would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be conusant, gives his irrevocable power to his contractor, to charge and bind his estate; and when such power is executed by the actual making of such subcontract for labor it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

In Bowen *v.* Phinney, 162 Mass., 593, Holmes, judge, said:

"Our statute gives an immediate lien to one who has performed labor in the repair of a building by the consent of the owner. Even if he is employed by a contractor, the laborer's lien is not by way of subrogation, and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land."

In Tennessee just such an act was upheld though most
69 vigorously assailed as beyond the legislative power. In answer to some of the objections urged, Justice Caldwell, in Cole Mfg. Co. *v.* Falls, 90 Tenn., 466, said:

"It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor and gave out his work with reference to that law. The right of lien to subcontractors and materialmen is, by operation of law, incorporated into and made a part of the owner's contract as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and materialman in certain contingencies; hence, the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he derives the benefit of the labor and material of those for whom the lien is provided, and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing."

In Colter *v.* Frese, 45 Ind., 96, the validity of such an act was most learnedly vindicated by Judge Warren, who delivered the unanimous opinion of the court.

Stewart *v.* Wright, 52 Iowa, 335, has been referred to as questioning the validity of such legislation. The case does not so decide. It turned upon the construction of the act which the court interpreted as giving a lien only upon the balance due from the owner when notice of the subcontractor's lien was filed. The judge, writing the opinion, does intimate a doubt as to the power of the legislature to subject the owner to debts of a contractor who had been paid in full before notice. But no such question was involved or decided.

The California act of March 30, 1868, gave to materialmen and laborers a lien upon a building to secure the amounts due them, "whether done or furnished at the instance of the owner of the building, or other improvement, or his agent; and every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

In Hicks *v.* Murray, 43 Cal., 515, the constitutionality of this act was assailed, but the court in an opinion of a few lines, said they thought the act was constitutional.

In the subsequent case of Renton *v.* Conley, 49 Cal., 185, the court construed the act as limiting the lien to the amount due
70 from the owner to the contractor under the contract at the time notice of the filing of the lien was given the owner, but no constitutional question was raised or decided.

In Maine like statutes, giving liens to subcontractors and materialmen who gave notice within the time fixed by the statute, have been enforced and their constitutionality maintained upon the ground that they applied only to future contracts, and that all building contracts were made subject to the provisions of the statute.

Spofford *v.* True, 33 Maine, 283.
Atwood *v.* Williams, 40 Maine, 409.
Taggard *v.* Buckmore, 42 Maine, 77.

In Atwood *v.* Williams, *supra*, the lien of the materialman was enforced, although the owner had made full payment to the contractor after the completion of the building and before notice of the claim to a lien was filed.

In Gurney *v.* Walsham, 16 R. I., 699, the constitutionality of such an act was affirmed upon the ground that the contract was made and entered into subject to its provisions. The defense that the owner had paid all that he owed the contractor before notice of claim of lien by materialmen, was not sustained.

In Virginia similar acts have been held valid: Roanoke, etc., Co. *v.* Karn, 80 Va., 589; N. & W. R. R. Co. *v.* Howison, 81 Va., 125.

So in Washington: Spokane Co. *v.* McChesnay, 1 Wash. Rep., 609. And in Connecticut: Paine *v.* Tillinghort, 52 Conn., 632. And in Maryland: Frensch *v.* Shyrock, 51 Md., 162.

The direct question as to the constitutionality of acts extending a lien to subcontractors and materialmen furnishing materials at the instance of contractors has not arisen in the Supreme Court of the United States nor in any of the United States courts of appeals, so far as we have been able to discover.

At act of Congress of March 2, 1833, 4 Stat. at Large, 695, gave a lien in the District of Columbia upon buildings to all who do work or furnish materials on order of the contractor, who should give notice to the owner within thirty days after being employed to do the work or furnish materials that they claimed such lien. In Winder *v.* Caldwell, 14 How., 434, this act was construed as not giving a lien to the principal contractor. The court said:

The contractor, though mentioned in the act, is not enumerated among those entitled to its benefit. The aim and policy of this statute is also obvious. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor

of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or encumbers them with liens; and thus one portion of his creditors are paid at
71 the expense of the labor and property of others. Or, the insolvent owner, who builds by the agency of a contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor, that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. But the contractor is neither within the letter nor the spirit of the act."

In Grant *v.* Strong, 18 Wall., 623, and McMurray *v.* Brown, 91 U. S., 258, and Van Stone *v.* Stillwell & Brice Mfg. Co., 142 U. S., 128, the question of waiver of the lien given under various State statutes was considered. In considering the character and nature of the lien the court, in McMurray *v.* Brown, 91 U. S., 258–266, said:

"Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or materialman is entitled to the lien which the law affords, provided he gives the required notice within the specified time."

In Van Stone *v.* Stillwell & Brice Mfg. Co., 142 U. S., 128–136, it was said:

"It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialman and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."

In Central Trust Co. *v.* Condon, 31 U. S. A., 387–422, a lien in favor of subcontractors was enforced against mortgagees by this court. Judge Taft, in delivering the opinion of the court touching the character of the lien, said:

"A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. Green *v.* Williams, 8 Pickle (Tenn.), 220. It is independent of, and superior to, his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien."

72 In Central Trust Co. *v.* Richmond, etc., R. Co., 31 U. S. A., 675–688, we enforced a lien in favor of such subcontractors arising under a Kentucky statute. Touching the origin and nature of the lien, we said:

"It is not a lien originating in a contract for a lien, but arises out of the statute independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered." * * * "The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractor does not spring out of the lien of the contractor, and, is not derived therefrom or subordinate thereto. The aggregate of all the liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or non-existence of a contractor's lien, and the waiver of a lien by a contractor will not affect the subcontractor's lien."

In neither of these cases, though the amounts involved were great, was any constitutional objection to the statute giving the lien suggested, though very eminent counsel appeared in each case. The constitutional validity of statutes giving an independent lien has the support of most of the text-writers.

2 Jones on Liens, 286; Phillips' Mechanics' Liens, sec. 30; Boisot on Mechanical Liens, secs. 22, 23.

Overton on Liens, section 553, has been cited as advancing a contrary view.

If we had doubt as to whether such statute was "due process of law," or violated the fundamental right of owning and enjoying property, or unreasonably restrained liberty of contract, we should be disposed to yield to the current and weight of authority upholding such acts as valid and constitutional. No court is justified in striking down an act of legislation unless it is clearly satisfied that the act is in conflict with the organic law limiting the power of the legislative branch of Government. Such statutes have met with the approval of the legislative bodies of nearly every State in the Union, as well as of Congress, as indicated by the act of 1833, construed in Winder *v.* Caldwell, 14 How., 434. They have survived assault whenever the question has arisen, save in Ohio and Michigan, and to a limited degree in Pennsylvania, and in a still larger number of instances have been enforced without question as to their validity.

But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice and most often administer an equity which has recognition under every system of law. That principle is, that every one who by his labor or materials has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation.

73 This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any

agreement the common law gave to one who by his labor or expense has made, preserved, enlarged or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrender possession. So, we find another illustration in the lien given one who in the exercise of a quasi-public employment is required to receive or perform some service in respect to the thing upon which the lien is given. That the owner who sells his chattel shall not be required to part with it until the price is paid rests upon the justice of the matter and not upon any agreement. But the remedies prescribed by the common law by no means embrace the numberless instances in which the inherent right of the matter requires that a charge or lien should be recognized as arising out of the nature of the transaction, independently of any agreement. That wide class of trusts arising out of the conduct of the parties, either with or without intention, but without express words of creation, which we call constructive or implied trusts, rest upon the natural justice which will not permit one to retain that which in justice does not belong to him and therefore fastens upon the thing, or that into which it is traced, a charge or lien in favor of the equitable owner. So, the vendor of realty may ordinarily, without any express agreement, apply the property sold to the payment of the price. There are a large variety of cases where a lien has been recognized as arising out of the nature of the transaction although there was no direct contractual relation between the parties affected. Thus, in the maritime law the last lien created by the master of a ship for supplies or repairs is entitled to preference over prior liens; the principle being that the common pledge has thereby been preserved for the common benefit. So, he who rescues goods from capture or the perils of the sea has a lien thereon for his compensation. The meritorious character of a claim often displaces prior burdens, as in the case of supplies and labor furnished a mortgaged railway company to keep it in operation and preserve the property for the benefit of all interested.

Whoever takes and holds possession of land to which another has the better title is liable to the true owner for the rents and profits, and no distinction is recognized between a *bona fide* and *mala fide* possession. Green *v.* Biddle, 8 Wheaton, 1, 74. But this was a harsh rule when applied to a case where the rents and profits had been offset by lasting improvements which had actually increased the value of the land. Courts of equity, therefore, soon applied the principle that where the owner resorted to a court of equity for an account of rents and profits, the permanent improvements should offset the liability of the possessor if his possession and improvement were in good faith.

2 Story Eq. Juris., secs. 799*a*–799*b*–1237–1239.

In Bright *v.* Boyd, 1 Story, 478, and Fed. case No. 1875, and same case in 2 Story, 605, Fed. case No. 1876, Justice Story laid
74 down the broad doctrine that a *bona fide* purchaser, without notice of defect in his title, who makes improvements upon the estate, has a lien upon the estate for the increased value, after

deducting rents and profits, and a court of equity will enforce this lien against the true owner who recovers the estate at law against such a purchaser. This case has been adopted and approved in Valles' Heirs *v.* Fleming's Heirs, 29 Mo., 152; Union Hall Ass. *v.* Morrison, 39 Md., 281, and Hatcher *v.* Briggs, 6 Oregon, 31; though it cannot be said to have received any very general support, though often cited The reason is doubtless found in the fact that the equities of *bona fide* purchasers of defective titles were so generally recognized as to result in statutes in most of the States, called betterment or occupant statutes, which provide that a *bona fide* occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner to the extent that his improvements have increased the value of the land. Though the operation of these statutes is to make the true owner pay for improvements made against his will and which he might not desire, the courts have sustained their constitutionality as giving remedy where before there had been none, though a strong equity existed.

Cooley Cons. Lim., 486 *et seq.*; Brown *v.* Storm, 4 Vt., 37; Ross *v.* Irving, 14 Ill., 171; Griswold *v.* Bragg, 48 F. R., 519; Hunt's Lessee, 5 Ohio, 132; Scott *v.* Mather, 14 Texas, 235; Davis *v.* Powell, 13 Ohio, 308; McCoy *v.* Grandy, 3 Ohio St., 463; Bacon *v.* Callender, 6 Mass., 303; Welch *v.* Wodsworth, 30 Conn., 149; Whitney *v.* Richardson, 31 Vt., 300.

The constitutionality of a similar Tennessee act was denied in Nelson *v.* Allen, 1 Yerger, 376; but Chief Justice Catron, in a note, says the question did not arise.

Not only was the equity so broadly declared and enforced by Justice Story in Bright *v.* Boyd, *supra*, recognized and enforced by the civil law, but in that system of law very high consideration was given to all who had by their contributions benefited, preserved or enlarged the estate or property of another, and among creditors secured by a common pledge or mortgage those whose contributions were given and used for the benefit of the thing hypothecated were privileged, and among this class those whose contributions were last given and used had the preference.

Mackeldy's Roman Law, 280, 281.

Domat says: "Among creditors who are privileged, it does not matter which of them is first or last in order of time, for they are distinguished only by the nature of their privileges." Domat Civil Law by Strahon, 681. Thus, he who had sold an immovable thing, was privileged for the price, before the creditors of the purchaser, and all others as to the thing sold. So he who loaned money to a purchaser to pay the purchase price, had the same privilege as the seller would have had till he had been paid. He who loaned
75 money to preserve the thing, or to make an improvement of an estate had a like privilege. Domat Civil Law by Strahon, 682–683. This equity was, by the civil law, extended to all who had contributed to the preservation, repair, enlargement or creation of an improvement on land. This privilege is thus stated by Domat, p. 683, section 1744:

"Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of works, and which the seller has for the price of the thing sold."

None of these instances from either the civil or common law of a charge or preference are dependent upon an express agreement for such privilege over other creditors. They have their basis in the nature of the transaction. Statutes which give to a contractor or materialman, dealing directly with the owner, a lien on the building or land, do so independently of any agreement for a lien, but their validity has never been doubted. Yet the basis for the interposition of a lien is the mere equity in favor of him who by his labor or materials has benefited the owner, and has acquired therefore an interest in the property benefited to secure his just compensation.

In most instances it is well understood that the contractor will employ others to aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials, a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others, an independent lien was given to all who should at the instance of the owner or his contractor contribute toward the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who at the instance of his contractor shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts it cannot be said to impair the obligation of a contract.

If the law be subject to no other objections, it impairs no
76 contract, for all thereafter made are entered into upon the basis of the law. "The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect."

Edwards *v.* Kearzey, 96 U. S., 595; Greenwood *v.* Freight Co., 105 U. S., 13; Denny *v.* Bennett, 128 U. S., 489; Smith *v.* Parsons, 1 Ohio, 236; Weil *v.* State, 46 Ohio St., 450.

Neither can the owner be said to be thereby deprived of his prop-

erty without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law.

Provident Institution *v.* Jersey City, 113 U. S., 506–514.

If then this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purposes of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure to those who by their labor or materials have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another, would be fatal to the legislation as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and materials by the owner. It is in this connection of the owner with such debts that the justice of the statute is found. In paying off such claims the owner may, if he exercise proper precaution, pay only his own debt to the contractor. If he be required to pay such subcontractors when nothing is due the principal contractor it is his own fault.

That the liability of the owner in respect to building contracts is restrained in some degree by this statute must be admitted. If he pay in advance, or contract to pay in property, or by an exchange of paper, and his contractor be dishonest or insolvent, he may find himself involved by the contractor's debts for labor or supplies. This contingency he may not always be able to guard against. But as much may be said of those who furnish labor or materials at the instance of the contractor. Without the lien they must look alone to the contractor, and may not always be able to protect
77 themselves. Inasmuch as the owner actually gets the benefit of their contributions to his property, their equity is a strong one, and the legislature has, in its discretion, determined to cast upon the owner the responsibility of guarding against the defaults of a contractor selected by himself. To protect the class having this equity the making of building contracts has been regulated. The restraints upon the owner are neither arbitrary nor oppressive, nor are they, under this Ohio statute, any more onerous than required by the necessity of protecting those who actually do the work or furnish the materials by which the owner is benefited. To permit such persons to follow and recover their contributions in kind would be futile to them and disastrous to the owner. A law which has for its basis equitable principles which in all times and

in all ages have had recognition, cannot be arbitrary and oppressive to the extent of exceeding the boundary of legislative discretion. Restraints upon liberty of contract are constantly met with in the legislation of every State. Statutes requiring certain contracts to be in writing, or to be witnessed, or acknowledged, or registered; statutes regulating interest, or the time within which rights may be enforced, and statutes exempting property from liability to execution, are notable examples of statutes regulating and limiting contracts. No more striking example of interference with liberty of contract is afforded than the statute upheld by the Ohio court in Weil *v.* State, 46 Ohio St., 450. The statute there declared valid was one which regulated conditional sales of personal property, or sales upon the installment plan, and made the violation of one of its sections a misdemeanor.

The equity in favor of those to whom the benefit of the Ohio lien law is extended is in its nature comparable to many equities recognized by courts of chancery and in other systems of law. But it was an equity upon which there was no remedy. The statute gives one in respect to future contracts. We cannot say that the remedy is so arbitrary or oppressive, or so unreasonable, as to be an act in excess of legislative power. The right of him who by his labor and materials had contributed to the betterment of another's estate was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who at the instance of the contractor shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its enactment. Neither upon reason or
78 authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we must declare our conscientious judgment to be that the Ohio statute was not void, and that complainants are entitled to relief thereunder. The decree of the circuit court must be reversed. The demurrer will be overruled and the cause remanded for answer and further proceedings not inconsistent with this opinion.

79 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Benj. F. Jones *et al.* against The Great Southern Fire Proof Hotel Co. and Sosman & Landis against The Great Southern Fire Proof Hotel Co., Nos. 535 & 536, October term, 1897, as the same remains upon the files

and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this twenty-eighth day of May, 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

80 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you suits in which Benjamin F. Jones *et al.* are appellants and The Great Southern Fire Proof Hotel Company is appellee, No. 535, and Sosman & Landis are appellants and The Great Southern Fire Proof Hotel Company is appellee, No. 536, which suits were removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the southern district of Ohio, and we being willing for certain reasons that the said causes and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
81 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said causes, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

I received the above writ this 14th day of March, 1899, and do hereby return the same pursuant to stipulation of counsel filed in this court, a duplicate copy of which is attached hereto and is as follows:

Supreme Court of the United States.

THE GREAT SOUTHERN FIRE PROOF HOTEL Company, Petitioner,
vs.
BENJAMIN F. JONES, GEORGE M. LAUGHLINS, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., Doing Business under the Firm Name and Style of Jones & Laughlins, Limited, and Others, Respondents.

Agreement to Dispense with an Additional Certified Copy of the Transcript.

It is hereby mutually stipulated and agreed by and between the undersigned parties, by their respective attorneys, that the certified copy of the transcript of the record and proceedings in the United States circuit court of appeals, sixth circuit, in the case wherein Benjamin F. Jones and others were appellants and The Great Southern Fire Proof Hotel Company was appellee, known on the dockets of said circuit court of appeals as # 535, and wherein Sosman and Landis were appellants and The Great Southern Fire Proof Hotel Company was appellee, known on the dockets of said circuit court of appeals as # 536, which transcript is now on file in the Supreme Court of the United States, in case # 711, October term, 1896, wherein The Great Southern Fire Proof Hotel Company is petitioner and Benjamin F. Jones and others and Sosman and Landis are respondents, in which said cause # 711 a writ of certiorari has been issued on the application of the said The Great Southern Fire Proof Hotel Company, may be taken as a return to the said writ of certiorari which issued out of the Supreme Court of the United States in the aforesaid case # 711 on the 6th day of March, 1899, and the undersigned do each respectively request the clerk of the United States circuit court of appeals, sixth circuit, to forward and certify a copy of this agreement with his return to said writ to the clerk of the Supreme Court of the United States.

J. E. SATER AND
D. F. PUGH,
Att'ys for Petitioner.
TALFOURD P. LINN,
Att'y for Jones & Laughlins, Limited.
GEO. K. NASH,
Att'y for Sosman & Landis.

In witness whereof I have hereunto set my hand and the seal of the United States circuit court of appeals for the sixth circuit this 14th day of March, 1899.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

82 [Endorsed:] 17,296 Supreme Court of the United States. No. 210, October term, 1899. The Great Southern Fire Proof Hotel Co. *vs.* B. F. Jones *et al.* and Sosman & Landis. Writ of certiorari and return. Filed Mar. 16, 1899.